

# **S. M. STOLLER CORPORATION**

**TERMS AND CONDITIONS**

**FOR**

**CONSTRUCTION SUBCONTRACTS**

**GJO-PROC-102**

**December 1, 2005**



Terms and Conditions  
For  
Construction Subcontracts

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## **1 DEFINITIONS**

As used throughout this subcontract, the following terms shall have the meaning set forth below:

- 1.1 Government means the United States of America.
- 1.2 DOE means the U. S. Department of Energy, the Secretary (Agency head) of DOE, or any duly authorized representative of the Agency head, including the Contracting Officer.
- 1.3 STOLLER means S. M. STOLLER CORPORATION.
- 1.4 Contracting Officer means the authorized Government representative administering the prime contract, acting on behalf of the Government. The term includes the authorized representative of a Contracting Officer acting within the limits of his/her authority.
- 1.5 Contractor means STOLLER in its performance of a Prime Contract with the United States of America and includes the duly authorized representatives thereof acting within the limits of their authority.
- 1.6 Contract Administrator means the person properly designated to administer this subcontract on behalf of the Contractor and includes the authorized representative of a Contract Administrator acting within the limits of written authority delegation.
- 1.7 Construction Inspector (CI) means the properly designated Contractor representative, who is directly responsible for maintaining liaison with the Subcontractor for the purpose of monitoring Statement of Work progress of the project and evaluating final Statement of Work results.
- 1.8 Subcontract means the total contents of this written instrument, including work to be performed and the terms and conditions under which it shall be performed. Except as otherwise provided in this subcontract, the term subcontract includes purchase orders under this subcontract.
- 1.9 Subcontractor means that party specifically identified as "Subcontractor" on the Signature Page of this subcontract to which these terms and conditions are attached, and includes the authorized representatives thereof acting within the limits of their authority.
- 1.10 Hazardous Substance means any substance so identified pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and regulations adopted hereunder.
- 1.11 Hazardous Waste means any substance so identified pursuant to the Federal Solid Waste Disposal Act, as amended, and regulations adopted hereunder, or pursuant to the Colorado statutes relating to hazardous waste, and regulations adopted hereunder.
- 1.12 Contaminated Material includes uranium mill tailings: fill material, natural soils, concrete, asphalt pavement, or other materials exhibiting a radioactivity in excess of U. S. Environmental Protection Agency standards.
- 1.13 Clean (uncontaminated or non-contaminated) Material - Material, either on-site or borrowed, free of roots, organic matter, trash, debris, frozen matter, and lumps or stones larger than two inches in any dimension, which has been radiologically surveyed by the Contractor to determine that radioactive isotopes are within acceptable levels.
- 1.14 Days - All references to "day" or "days" mean calendar day or days, unless specifically defined otherwise in the subcontract documents.

1.15 Property Owner/Homeowner - Any person, persons, partnership, corporation, or their legal private or public entity having legal control of land, buildings, or other improvements on the property for which the Subcontractor has a remedial action subcontract.

1.16 Lower Tier Subcontractor - This term includes all companies utilized by the Subcontractor at any tier including all vendors and suppliers entering the project site.

## **2 EXTRAS**

Except as otherwise provided in this subcontract, no payment for extras shall be made unless such extras and the price thereof have been authorized in writing by the Contractor.

## **3 RESERVED**

## **4 PRIVACY OF CONTRACT**

4.1 This subcontract does not bind or purport to bind the Government or the Contracting Officer or give privacy of contract to DOE through the Contractor's relationship with DOE.

## **5 PRINTING**

The Subcontractor shall not engage in any printing in connection with the performance of work under this contract.

Note: The term "Printing" includes the following process: composition, plate making, presswork, binding, microform publishing, or the end items produced by such processes with duplication of single 8-1/2" x 11" pages of more than 5,000 copies or 25,000 aggregate pages.

## **6 RESERVED**

## **7 ASSIGNMENT**

7.1 The Contractor may assign this subcontract to DOE or to such contractor as DOE may designate to perform the Contractor's obligation hereunder. Upon receipt by the Subcontractor of written notice that DOE or a contractor so designated by the Contractor or DOE has accepted an assignment of this subcontract and assumed such obligations, the Contractor shall be relieved of all responsibility hereunder and the Subcontractor shall thereafter look solely to such assignee for performance of the Contractor's obligations.

7.2 The Subcontractor shall not assign this subcontract or any interest therein, nor claims hereunder without the prior written consent of the Contractor or the Contractor's assignee.

7.3 Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15); if this subcontract provides for payments aggregating \$1,000.00 or more, claims for monies due or to become due the Subcontractor from the Contractor under this subcontract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this subcontract and not already paid and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party, as agent or trustee for two or more parties participating in such financing.

## **8 EXAMINATION OF RECORDS BY COMPTROLLER GENERAL**

(This clause is applicable if the amount of this subcontract exceeds \$10,000.)

8.1 The Subcontractor agrees that the Comptroller General of the United States or a duly authorized representative who is an employee of the Government shall, until 3 years after final payment under this subcontract, or for any shorter period specified in Federal Acquisition Regulations (FAR) Subpart 4.7 unless DOE authorizes their prior disposition, have access to and the right to examine any of the



Subcontractor's directly pertinent books, documents, papers, or other records involving transactions related to this subcontract.

- 8.2 The Subcontractor further agrees to include in all his subcontracts hereunder a provision to the effect that lower-tier subcontractor agrees that the Comptroller General of the United States or a duly authorized representative who is an employee of the Government shall, until 3 years after final payment under the subcontract, or for any shorter period specified in Federal Acquisition Regulations (FAR) Subpart 4.7 unless DOE authorizes their prior disposition, have access to and the right to examine any of the lower-tier subcontractor's directly pertinent books, documents, papers, or other records involving transactions related to the subcontract. The term "subcontract" as used in this article excludes
  - 8.2.1 purchase orders not exceeding \$10,000 and
  - 8.2.2 subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.
- 8.3 The period of access and examination described in 8.1 and 8.2 above, for records which relate to the following items shall continue until such appeals, litigation, claims, or exceptions are disposed of.
  - 8.3.1 appeals under the "Disputes" clause of the contract,
  - 8.3.2 litigation or the settlement of claims arising out of the performance of this contract, or
  - 8.3.3 costs and expenses of this contract to which the Comptroller General or a duly authorized representative from the General Accounting Office has taken exception,

## **9 INSURANCE (CONSTRUCTION)**

- 9.1 The Subcontractor shall procure and maintain such bonds and insurance as required by law for the type(s) of work and for the locations where the work is being performed. The terms of any such insurance policy shall be submitted to the Contractor upon request. The Subcontractor will indemnify and save harmless the Contractor, its employees, and agents from and against liability, demands, claims, damage and expense by reason or on account of property damage, death and personal injury of whatsoever nature or kind arising out of, as a result of, or in connection with the performance of this subcontract which is occasioned by the actions or omission of Subcontractor or its suppliers.
- 9.2 The Subcontractor will maintain and carry as a minimum:
  - 9.2.1 Automobile Comprehensive Liability - Hired, Owned, and Non-owned
  - 9.2.2 Workmen's Compensation Insurance in statutory amounts.
  - 9.2.3 General Liability to include Comprehensive Form, Contractual, Independent Contractor, Premises/ Operations, Product/Completed Operations, Underground/Collapse Explosion as appropriate, Broad Form Property Damage, and Personal Injury.
  - 9.2.4 All subcontractors shall carry the following insurance at a minimum:

Comprehensive automobile limit shall be \$500,000 per occurrence combined single limit for bodily and property damage for subcontracts under \$500,000, and the limit shall be \$1,000,000 for subcontracts over \$500,000. Comprehensive General Liability shall each have a \$500,000/ \$500,000 limit per each occurrence/ aggregate, combined single limit for bodily injury and property damage liability for subcontracts under \$500,000, and the limit shall be \$1,000,000 for subcontracts over \$500,000.
- 9.3 Policies issued for subcontractors shall be endorsed to include the Contractor and the Department of Energy, as named additional insured.
- 9.4 The Subcontractor will furnish Certificates of Insurance indicating the required minimum coverages. If more than one insurance company is involved, separate certificates will be provided by each such

company. Certificates will not be acceptable unless all the listed coverages are provided in at least the amounts specified above together with required endorsements, and signed by an authorized representatives of the insurance company.

- 9.5 A ten (10) day advance written notice is required in the event of cancellation, non-renewal or material change of any policy.

## **10 BONDS, PAYMENT AND PERFORMANCE**

- 10.1 The Subcontractor agrees to furnish either

10.1.1 a payment bond in the form of good and sufficient surety or sureties acceptable to the Contractor for the protection of persons furnishing material or labor in connection with the performance of the work under this subcontract, or

10.1.2 in lieu thereof, to deposit for this purpose one of the types of security as follows:

10.1.2.1 Sureties on Bonds. Every corporate surety offered for a bond must appear on the list contained in Treasury Department Circular 570 and the amount of the bond must not be in excess of the limits stated therein. A partnership or other unincorporated association, as such, will not be accepted as a surety. If individuals are sureties, at least two individual sureties must execute the bond and the net worth of each individual surety must be not less than the penal amount of the bond.

10.1.2.2 Options in Lieu of Sureties. In lieu of furnishing sureties on bonds, offerors may pledge and deposit United States bonds or notes, certified or cashier's checks, bank drafts, Post Office money orders, or currency in an amount equal to the penal sum of the bond.

10.1.3 The penal sum of such security will be as follows:

10.1.3.1 when the subcontract price is less than \$1,000,000, the penal amount shall be 50 percent of the subcontract price;

10.1.3.2 when the subcontract price is more than \$1,000,000 but not more than \$5,000,000, the penal amount shall be 40 percent of the subcontract price and,

10.1.3.3 when the subcontract price is more than \$5,000,000, the penal amount shall be \$2,500,000.

10.1.4 Payment bonds or other sureties in lieu thereof will not be required for construction subcontracts which are not expected to exceed \$25,000. Subcontracts under \$25,000 will require a Certification of Lien Release for each property before final payment is made for that property.

- 10.2 The Subcontractor further agrees to furnish either

10.2.1 a performance bond with good and sufficient surety or sureties acceptable to the Contractor in connection with the performance of the work under this subcontract, or

10.2.2 in lieu thereof, to deposit for this purpose one of the types of security listed in 10.1.2 above.

The penal sum of such sureties will be 100 percent of the subcontract price or the estimated subcontract price.

- 10.3 Any bonds or other securities required hereunder will be dated the same or later than the date of the subcontract and will be furnished by the Subcontractor to the Contractor at the time the subcontract is executed.

- 10.4 If any surety upon any bond furnished in connection with this subcontract becomes unacceptable to the Contractor, or if any such surety fails to furnish reports as to his financial condition from time to time

as may be requested by the Contractor, the Subcontractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Contractor and of persons supplying labor or materials in the prosecution of the work contemplated by this subcontract.

- 10.5 If the subcontract price is increased to such an extent that the penal sum of any bond becomes inadequate in the opinion of the Contractor, the Subcontractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Contractor and of persons supplying labor or materials in the prosecution of the work contemplated by this subcontract.

## **11 GOVERNMENT-FURNISHED PROPERTY**

- 11.1 The Contractor shall deliver to the Subcontractor, for use in connection with and under the terms of this subcontract, the property described as Government-furnished property in the Schedule or specifications, together with such related data and information as the Subcontractor may request and as may reasonably be required for the intended use of such property (hereunder referred to as "Government-furnished property"). The delivery or performance dates for the supplies to be furnished by the Subcontractor under this subcontract are based upon the expectation that Government-furnished property suitable for use will be delivered to the Subcontractor at the times stated in the Schedule, or, if not so stated, in sufficient time to enable the Subcontractor to meet such delivery or performance dates. In the event the Government-furnished property is not delivered to the Subcontractor by such time or times, the Contractor shall, upon timely written request made by the Subcontractor, make a determination of the delay, if any, occasioned the Subcontractor and shall equitably adjust the estimated cost, fixed-fee, or delivery or performance dates, or all of them, and any other contractual provisions affected by any such delay, in accordance with the procedures provided for in the clause of this subcontract entitled "Changes." In the event that Government-furnished property is received by the Subcontractor in a condition not suitable for the intended use, the Subcontractor shall, upon receipt thereof notify the Contractor of such fact and, as directed by the Contractor, either return such property at the Contractor's expense or otherwise dispose of the property, or effect repairs or modifications. Upon completion of return or repair, the Contractor upon written request of the Subcontractor shall equitably adjust the estimated cost, fixed-fee, or delivery or performance dates, or all of them, and any other contractual provision affected by the return or disposition, or the repair or modification in accordance with the procedures provided for in the clause of this subcontract entitled "Changes." The foregoing provisions for adjustment are exclusive and the Contractor or the Government shall not be liable to suit for breach of subcontract by reason of any delay in delivery of Government-furnished property or delivery of such property in a condition not suitable for its intended use.

11.1.1 By notice in writing, the Contractor may decrease the property furnished or to be furnished by the Government under this subcontract, or substitute other Government-owned property for property to be furnished by the Government, or to be acquired by the Subcontractor for the Government, under this subcontract. The Subcontractor shall promptly take such action as the Contractor may direct with respect to the removal and shipping of property covered by such notice.

11.1.2 In the event of any decrease in or substitution of property pursuant to paragraph (11.1.1), above, or any withdrawal of authority to use property provided under any subcontract or lease, which property the Government had agreed in the Schedule to make available for the performance of this subcontract, the Contractor, upon the written request of the Subcontractor (or, if the substitution of property causes a decrease in the cost of performance, on his own initiative), shall equitably adjust such contractual provisions as may be affected by the decrease, substitution, or withdrawal, in accordance with the procedures provided for in the "Changes" clause of this subcontract.

- 11.2 Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the Subcontractor, for the cost of which the Subcontractor is entitled to be reimbursed as direct item of cost under this subcontract, shall pass to and vest in the Government upon delivery of such property to the vendor. Title to other property, the cost of which is reimbursable to the Subcontractor under the subcontract, shall pass to and vest in the Government upon

11.2.1 issuance for use of such property in the performance of this subcontract, or

- 11.2.2 commencement of processing or use of such property in the performance of this subcontract, or
- 11.2.3 reimbursement of the cost thereof by the Government in whole or in part, whichever first occurs. All Government-furnished property, together with all property acquired by the Subcontractor title to which vests in the Government under this paragraph, are subject to the provisions of this clause and are hereinafter collectively referred to as "Government property." Title to the Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty.
- 11.3 The Subcontractor shall be directly responsible for and accountable for all Government property provided under this subcontract. The Subcontractor shall establish and maintain a system to control, protect, preserve, and maintain all Government property in accordance with sound industrial practices. This system shall, upon request by the Contractor, be submitted for review and, if satisfactory, approved in writing by the Contractor. The Subcontractor shall maintain and make available such records as are required by the approved system and must account for all Government property until relieved of responsibility therefore in accordance with the written instructions of the Contractor. To the extent directed by the Contractor, the Subcontractor shall identify Government property by marking, tagging, or segregating in such manner as to clearly indicate its ownership by the Government.
- 11.4 The Government property shall, unless otherwise provided herein or approved by the Contractor, be used only for the performance of this subcontract.
- 11.5 The Subcontractor shall maintain and administer, in accordance with sound industrial practice, a program for the utilization, maintenance, repair, protection, and preservation of Government property so as to assure its full availability and usefulness for the performance of this subcontract. The Subcontractor shall take all reasonable steps to comply with all appropriate directions or instructions, which the Contractor may prescribe as reasonably necessary for the protection of Government property.
- 11.5.1 The Subcontractor shall not be liable for any loss or damage to the Government property, or for expenses incidental to such loss or damage, except that the Subcontractor shall be responsible for any such loss or damage (including expenses incidental thereto):
- 11.5.1.1 Which results from willful misconduct or lack of good faith on the part of any one of the Subcontractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of:
- 11.5.1.1.1 All or substantially all of the Subcontractor's business; or
- 11.5.1.1.2 All or substantially all of the Subcontractor's operations at any one plant or separate location in which this subcontract is being performed; or
- 11.5.1.1.3 All separate and complete major industrial operation in connection with the performance of this subcontract.
- 11.5.1.2 Which results from a failure on the part of the Subcontractor, due to the willful misconduct or lack of good faith on the part of any of his directors, officers, or other representatives mentioned in subparagraph (11.5.1), above:
- 11.5.1.2.1 To maintain and administer, in accordance with sound industrial practice, the program for utilization, maintenance, repair, protection, and preservation of Government property as required by paragraph (11.4) hereof, or to take all reasonable steps to comply with any appropriate written direction of the Contractor under paragraph (11.4) hereof; or
- 11.5.1.2.2 To establish, maintain, and administer in accordance with paragraph (11.2.3) hereof a system for control of Government property.

- 11.5.1.3 For which the Subcontractor is otherwise responsible under the express terms of the article or articles designated in the Schedule;
- 11.5.1.4 Which results from a risk expressly required to be insured under this subcontract, but only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater; or
- 11.5.1.5 Which results from a risk, which is in fact covered by insurance or for which the Subcontractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement.
- 11.5.1.6 Any failure of the Subcontractor to act, as provided in subparagraph (11.5.1.2), above, shall be conclusively presumed to be a failure resulting from willful misconduct, or lack of good faith on the part of such directors, officers, or other representatives mentioned in subparagraph (11.5.1.1), above, if the Subcontractor is notified by the Contractor by registered or certified mail addressed to one of such directors, officers, or other representatives, of the Government's disapproval, withdrawal of approval, or nonacceptance of the Subcontractor's program or system. In such event it shall be presumed that any loss or damage to Government property resulted from such failure. The Subcontractor shall be liable for such loss or damage unless he can establish by clear and convincing evidence that such loss or damage did not result from his failure to maintain an approved program or system, or occurred during such time as an approved program or system for control of Government property was maintained.
- 11.5.1.7 If more than one of the above exceptions shall be applicable in any case, the Subcontractor's liability under any one exception shall not be limited by any other exception. If the Subcontractor transfers Government property to the possession and control of a lower-tier subcontractor, the transfer shall not affect the liability of the Subcontractor for loss or destruction of or damage of the property as set forth above. However, the Subcontractor shall require the lower-tier subcontractor to assume the risk of, and be responsible for, any loss or destruction of or damage to the property while in the latter's possession or control, except to the extent that the lower-tier subcontract, with the prior approval of the Contractor, provides for the relief of the lower-tier subcontractor from such liability. In the absence of such approval, the lower-tier subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of the prime contract.
- 11.5.2 The Subcontractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance, or any provisions for a reserve, covering the risk of loss of or damage to the Government property, except to the extent that the Government may have required the Subcontractor to carry such insurance under any other provisions of this subcontract.
- 11.5.3 Upon the happening of loss or destruction of or damage to the Government property, the Subcontractor shall notify the Contractor thereof, and shall communicate with the loss and salvage organization, if any, now or hereafter designated by the Contractor, and with the assistance of the loss and salvage organizations so designated (unless the Contractor has designated that no such organization be employed), shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best possible order, and furnish to the Contractor a statement of:
  - 11.5.3.1 The lost, destroyed, and damaged Government property;
  - 11.5.3.2 The time and origin of the loss, destruction, or damage;
  - 11.5.3.3 All known interests in commingled property of which the Government property is a part; and

- 11.5.3.4 The insurance, if any, covering any part of or interest in such commingled property.
- 11.5.3.5 The Subcontractor shall make repairs and renovations of the damaged Government property or take such other action as the Contractor directs.
- 11.5.4 In the event the Subcontractor is indemnified, reimbursed, or otherwise compensated for any loss or destruction of or damage to the Government property, he shall use the proceeds to repair, renovate, or replace the Government property involved, or shall credit such proceeds against the cost of the work covered by the subcontract, or shall otherwise reimburse the Government, as directed by the Contractor. The Subcontractor shall do nothing to prejudice the Government's right to recover against third parties for any such loss, destruction, or damage and, upon the request of the Contractor, shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where the lower-tier subcontractor has not been relieved from liability for any loss or destruction of or damage to Government property, the Subcontractor shall enforce the liability of the lower-tier subcontractor for such loss or destruction of or damage to the Government property for the benefit of the Government.
- 11.6 The Government, and any persons designated by it, shall at all reasonable times have access to the premises where any of the Government property is located, for the purpose of inspecting the Government property.
- 11.7 Upon the completion of this subcontract, or at such earlier dates as may be fixed by the Contractor, the Subcontractor shall submit to the Contractor in a form acceptable to him, inventory schedules covering all items of the Government property not consumed in the performance of this subcontract, or not theretofore delivered to the Government, and shall deliver or make such other disposal of such Government property as may be directed or authorized by the Contractor. The net proceeds of any such disposal shall be credited to the cost of the work covered by the subcontract or shall be paid in such manner as the Contractor may direct. The foregoing provisions shall apply to scrap from Government property: Provided, however, that the Contractor may authorize or direct the Subcontractor to omit from such inventory schedules any scrap consisting of faulty castings or forgings, or cutting and processing waste, such as chips, cuttings, borings, turnings, short ends, circles, trimmings, clippings, and remains and to dispose of such scrap in accordance with the Subcontractor's normal practice and account therefore as a part of general overhead or other reimbursable cost in accordance with the Subcontractor's established accounting procedures.
- 11.8 Unless otherwise provided herein, the Government:
  - 11.8.1 May abandon any Government property in place, and thereupon all obligations of the Government regarding such abandoned property shall cease; and
  - 11.8.2 Has no obligation to the Subcontractor with regard to restoration or rehabilitation of the Subcontractor's premises, neither in case of abandonment (paragraph 11.8.1, above), disposition of completion of need or of the subcontract (paragraph 11.6, above), nor otherwise, except for restoration or rehabilitation costs caused by removal of Government property pursuant to paragraph (11.1.1), above.
- 11.9 All communications issued pursuant to this clause shall be in writing.

## **12 FEDERAL STATE, AND LOCAL TAXES**

- 12.1 Definitions. The following terms shall have the meaning as set forth below:
  - 12.1.1 "Subcontract date," as used in this clause, means the date set for bid opening or, if this is a negotiated subcontract or a modification, the effective date of this subcontract or modification.

- 12.1.2 “All applicable Federal, State, and local taxes and duties,” as used in this clause, means all taxes and duties, in effect on the subcontract date, that the taxing authority is imposing and collecting on the transactions or property covered by this subcontract.
- 12.1.3 “After-imposed Federal Tax,” as used in this clause means any new or increased Federal excise tax or duty, or tax that was exempted or excluded on the subcontract date but whose exemption was later revoked or reduced during the subcontract period, on the transactions or property covered by this subcontract that the Subcontractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the subcontract date. It does not include social security tax or other employment taxes.
- 12.1.4 “After-relieved Federal Tax,” as used in this clause, means any amount of Federal excise tax or duty, except social security or other employment taxes, that would otherwise have been payable on the transactions or property covered by this subcontract, but which the Subcontractor is not required to pay or bear, or for which the Subcontractor obtains a refund or drawback, as the result of legislative, judicial, or administrative action taking effect after the subcontract date.
- 12.2 The subcontract price includes all applicable Federal, State, and local taxes and duties.
- 12.2.1 The subcontract price shall be increased by the amount of any after-imposed Federal tax, provided the Subcontractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the subcontract price, as a contingency reserve or otherwise.
- 12.3 The subcontract price shall be decreased by the amount of any after-relieved Federal tax.
- 12.4 The subcontract price shall be decreased by the amount of any Federal excise tax or duty, except social security or other employment taxes, that the Subcontractor is required to pay or bear, or does not obtain a refund of, through the Subcontractor’s fault, negligence, or failure to follow instructions of the Contractor.
- 12.5 No adjustment shall be made in the subcontract price under this clause unless the amount of the adjustment exceeds \$100.00.
- 12.6 The Subcontractor shall promptly notify the Contractor of all matters relating to any Federal excise tax or duty that reasonably may be expected to result in either an increase or decrease in the subcontract price and shall take appropriate action as the Contractor directs.
- 12.7 Contractor shall, without liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax when the Subcontractor requests such evidence and a reasonable basis exists to sustain the exemption.

### **13 OTHER SUBCONTRACTS**

- 13.1 The Contractor or the Government may undertake or award other contracts or subcontracts for additional work, at or near the site of work under this subcontract. The Subcontractor shall fully cooperate with such other contractor or subcontractor’s employees and carefully fit its own work to such additional work as may be directed by the Contractor. The Subcontractor shall not commit or permit any act, which will interfere with the performance of work by any other contractor or subcontractor or by Government or Contractor employees.
- 13.2 The Subcontractor shall not engage in agreements to do work for the property owner or lessee on the project site during the subcontract period without prior written notification to the appropriate Contract Administrator and his/her concurrence.

## **14 BUY AMERICAN ACT - CONSTRUCTION MATERIALS AND SUPPLIES**

- 14.1 In accordance with the Buy American Act (41 U.S.C. 10a-10d), and Executive Order 10582, December 17, 1954, (3 CFR 1954-58 Comp., p. 230), as amended by Executive Order 11051, September 17, 1962 (3 CFR 1959-63 Comp., p. 635), the Subcontractor will give preference to domestic construction material and domestic end products will be used (by the Subcontractor, lower-tier subcontractors, material men, and suppliers) in the performance of this subcontract except for nondomestic material listed in the subcontract.
- 14.2 The terms used in this clause shall have the following meaning:
  - 14.2.1 "Construction material" means articles, materials, and supplies brought to the construction site for incorporation into the building or work.
  - 14.2.2 A manufactured construction material is "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.
  - 14.2.3 "Component" means any article, material, or supply directly incorporated in a construction material.
- 14.3 The Subcontractor shall deliver only domestic end products, except those that the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; for which DOE determines that domestic preference would be inconsistent with the public interest; or for which DOE determines that cost to be unreasonable.

## **15 GRATUITIES**

- 15.1 The right of the Subcontractor to proceed may be terminated by written notice if, after notice and hearing, the Contractor or a designee determined that the Subcontractor, the agent, or another representative offered or gave a gratuity (e.g., an entertainment or gift) to an office, official, or employee of the Contractor and intended, by the gratuity, to obtain a contract or favorable treatment under a contract.
- 15.2 The facts supporting this determination may be reviewed by any court having lawful jurisdiction.
- 15.3 If this subcontract is terminated under paragraph 15 above, the Contractor is entitled to pursue the same remedies as in a breach of the contract.
- 15.4 The rights and remedies of the Contractor provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this subcontract.

## **16 NOTICE OF SUBCONTRACTOR LITIGATION AND CLAIMS**

- 16.1 The Subcontractor shall give the Contractor immediate notice in writing of any action filed against the Subcontractor arising out of the performance of this subcontract, and of any claim against the Subcontractor.
- 16.2 Except as otherwise directed by the Contractor, in writing, the Subcontractor shall furnish immediately to the Contractor copies of all pertinent papers received by the Subcontractor with respect to such action or claim.



## 17 CHANGES

- 17.1 The Contractor may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the subcontract, including changes—
  - 17.1.1 In the specifications (including drawings and designs);
  - 17.1.2 In the method or manner of performance of the work;
  - 17.1.3 In the Contractor or Government-furnished facilities, equipment, materials, services, or site; or
  - 17.1.4 Directing acceleration in the performance of the work.
- 17.2 Any other **written or oral** order (which terms as used in this clause shall include direction, instruction, interpretation, or determination) from the Contractor that causes such a change shall be treated as a change order under this clause: Provided, that the Subcontractor gives the Contractor written notice stating
  - 17.2.1 the date, circumstances, and source of the order and
  - 17.2.2 that the Subcontractor regards the order as a change order.
- 17.3 Except as provided in this clause, no order, statement, or conduct of the Contractor shall be treated as a change under this clause or entitle the Subcontractor to an equitable adjustment.
- 17.4 If any change under this clause causes an increase or decrease in the Subcontractor's cost of, or the time required for, the performance of any part of the work under this subcontract, whether or not changed by any such order, the Contractor shall make an equitable adjustment and modify the subcontract in writing. However, except for a proposal for adjustment (hereafter referred to as a proposal) based on defective specifications, no proposal for any change under clause 17.2 above shall be allowed for any costs incurred more than twenty (20) days before the Subcontractor gives written notice as required.
- 17.5 In the case of defective specifications for which the Contractor is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Subcontractor in attempting to comply with such defective specifications.
- 17.6 The Subcontractor must submit any proposal under this clause within thirty (30) days after
  - 17.6.1 receipt of a written change order under clause 17 above or
  - 17.6.2 the furnishing of a written notice under clause 17.1.4 above, by submitting to the Contractor a written statement setting forth the general nature and monetary extent of the proposal, unless this period is extended by the Contractor. The statement of proposal for adjustment may be included in the notice under clause 17.1.4 above.
- 17.7 Failure to agree to any adjustment shall be a dispute within the meaning of the clause of this subcontract entitled "Disputes." Nothing in this clause shall excuse the Subcontractor from proceeding with the subcontract as changed.
- 17.8 No claim by the Subcontractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this subcontract.

## 18 RADIATION PROTECTION

- 18.1 General

- 18.1.1 The Subcontractor and all lower-tiers shall comply with applicable provisions of the Contractor's Radiation Protection Program (RPP) as incorporated in site specific Radiological Work Permits (RWPs), the subcontract, and as communicated by Health and Safety personnel. Contractor personnel will enforce radiological safety and health provisions pursuant to the requirements of this subcontract.
- 18.1.2 Actions resulting in noncompliances with this section shall be addressed in accordance with Section 20.4 and may be cause for suspension of radiological work.
- 18.1.3 Subcontractor personnel assigned to work in radiological areas shall be trained by the Contractor on the requirements of the Radiation Protection Program. See Section 19.2, Radiological Worker Training.
- 18.2 All items, including vehicles and equipment leaving jobsites, which are posted, as Contamination Areas, shall be subject to a survey for radiological contamination prior to release. The Contractor is responsible for performing radiological surveys to release all items and equipment. Advance notice of four hours should be provided to the Contractor for large items and equipment to be released from the site. Note that in some situations survey techniques may not work, such as wet or cold conditions; in these cases, surveys may be slowed or may have to be postponed until adequate conditions exist.

## 19 TRAINING

### 19.1 General

The Subcontractor shall ensure that all safety related training requirements including hazard communication, hearing conservation, or other OSHA required training is provided for its employees. Documentation of all safety related training requirements shall be maintained on file at the Subcontractor's office. The Contractor may perform audits at any time during the performance of this subcontract to ensure proper documentation is maintained. Radiological Worker Training and Respirator Training will be provided by the Contractor periodically as required to accommodate training needs. The Subcontractor shall schedule training for proposed workers in advance of the work start date to ensure that the training is being offered and openings are available. Proposed workers will be required to present a picture identification to the instructor prior to the beginning of class. Individuals who do not present picture identification will not be allowed to attend training. Successful completion of training includes passing a written examination in English with a score of at least 80% and satisfactorily performing all required practical demonstrations.

### 19.2 Radiological Worker Training

19.2.1 All Subcontractor employees shall successfully complete the appropriate level of Radiological Worker Training provided by the Contractor prior to entering Radiological Areas. The level of training will be determined by the Contractor.

19.2.2 The Contractor will issue the Subcontractor a training record card for distribution to each Subcontractor employee successfully completing training. Each Subcontractor employee shall present the training card and a valid Picture ID to Contractor representatives on request as verification of successful completion of training. Failure to present the training card will result in removal from the jobsite during radiological work until successful training completion can be verified.

19.3 Respirator Training. Respirator training requirements shall be in accordance with the most current ANSI Z88.2 standard, when jobsite conditions require the use of respiratory protection equipment. Subcontractor employees shall be trained in the use of respirators prior to the wearing of a respirator on the jobsite. Respirator training will be provided by the Contractor periodically at the Contractor's discretion. The Subcontractor shall provide a statement signed by a physician, including the physician's telephone number and state license number as proof of medical qualification for wearing respiratory protection. This statement shall be provided prior to scheduling each worker for training. Personnel required to wear a respirator shall have a medical qualification, training, fit test and be clean shaven (within the previous 24 hours) in the seal area of the respirator face piece to ensure an airtight seal.

- 19.4 Hazardous Waste Site Training. Subcontractor employees requiring access to properties classified as hazardous waste sites shall complete the required level of training set forth in 29 CFR 1910.120. It is the responsibility of the Subcontractor to provide to the Contract Administrator prior to on site work proof of successful completion of Hazardous Waste training for each employee.

## **20 OCCUPATIONAL SAFETY AND HEALTH**

### **20.1 General**

The Subcontractor and all lower tiers shall comply with all Occupational, Safety and Health Administration (OSHA), DOE, and other Federal, State and local agency regulations and standards. In performing this subcontract, the Subcontractor shall provide for: protecting the safety and health of Subcontractor employees, other persons, and the environment, and preventing damage to property, materials, supplies, and equipment.

- 20.2 Competent Person. The Subcontractor and lower tiers shall name the “competent person” as defined in 29 CFR 1926.32 for all activities on the project where required by 29 CFR 1926.3. The “competent person” and their qualifications shall be identified in all applicable areas of work as part of the Subcontractor’s submittal.

- 20.3 Personal Protective Equipment (PPE). At some jobsites it may be necessary for Subcontractor employees to wear PPE and personal monitoring equipment as required by OSHA regulations or as directed by the Contractor for non-radiological hazards. The Contractor may direct the Subcontractor in the use of PPE, or personnel monitoring by the Subcontractor. The Contractor will provide necessary associated medical screening to the Subcontractor employees as determined by the Contractor. The Subcontractor shall ensure his employees adhere to all PPE and personnel monitoring requirements set forth by the Contractor.

- 20.4 Noncompliance. The Contractor shall notify the Subcontractor of any observed noncompliance with the requirements of this clause and any resultant corrective action required. The notice shall be delivered to the Subcontractor’s Site Superintendent at the jobsite and it shall be deemed sufficient notice of the noncompliance and required corrective action. If prompt corrective action is not taken by the Subcontractor, the Contractor may issue an order to suspend work in accordance with Clause 63 of the Terms and Conditions. Any suspension of work for noncompliance with safety and health requirements shall be at no cost to the Contractor. Continued noncompliance with safety and health requirements and nonresponsiveness to noted violations may result in further action, including Termination for Default.

- 20.5 Lower-tier Subcontractors. The Subcontractor shall be responsible for all lower-tier Subcontractor’s compliance with Health and Safety, including the flow down of these requirements to all lower tiers.

20.5.1 The Subcontractor shall provide a list of all proposed lower tier subcontractors for this subcontract prior to commencement of work.

20.5.2 All lower tier Subcontractors shall be subject to the record keeping, inspection, and training requirements in this subcontract. Noted deficiencies shall be promptly corrected or the Contractor may direct the Subcontractor to cancel such lower tier subcontracts without additional cost to the Contractor.

20.5.3 The Subcontractor and all lower-tier subcontractors shall comply with all safety and health requirements specified in the applicable Statement of Work.

20.5.4 The Subcontractor shall provide to the Contractor, the subcontractor’s Experience Modification Rate (EMR) and OSHA 300 and 300a forms for the previous three years.

- 20.6 Health and Safety Plan. The subcontractor and all lower tiers shall comply with the Contractor’s Health and Safety Plan.

#### 20.6.1 Contractor Preconstruction Safety Meeting

Representatives of the subcontractor shall meet with the Contractor's staff, at the preconstruction meeting for the purpose of reviewing the respective safety requirements and to discuss implementation of all health and safety provisions pertinent to the work under contract. Subcontractors shall be prepared to discuss, in detail, the procedures they intend to use to control the hazards incident to the major phases of the work and to comply with contractual obligations. The manner in which the subcontractor intends to administer their health and safety program and delegate the responsibilities for implementing the program will also be discussed. Any issues raised in this meeting shall be resolved prior to the commencement of work.

- 20.7 If the Subcontractor chooses to use their own respiratory protection program, that program shall meet the requirements of OSHA and the most current ANSI Z88.2 standard and shall be submitted to the Contractor for review.

#### 20.8 Accident Reporting.

- 20.8.1 The Subcontractor shall notify the Contractor of all job related accidents, events, and near misses which could affect the safety and health of subcontractor employees and the general public immediately (within one-half hour) of the occurrence. Any equipment and/or worksite area involved in an accident/incident or near miss will be secured and will remain secured until the Contractor Compliance and Project Management has given permission to resume work. The Subcontractor shall conduct an accident investigation for all OSHA recordable injuries/illnesses. The Contractor shall provide a safety representative to assist the Subcontractor in the investigation when requested. The Contractor shall provide the guidelines for conducting the investigation.
- 20.8.2 The Subcontractor shall provide total number of workers, total work hours and OSHA recordable injuries/illnesses to the Contractor. This information will be supplied in writing to the Contract Administrator on a weekly basis in the format requested by the Contractor.
- 20.8.3 The Subcontractor shall hold weekly safety meetings with employees and all lower-tier personnel. An attendance list with names and signatures of all personnel attending and a list of topics discussed shall be submitted to the Contractor on a weekly basis. A record copy of the training attendance sheets shall be maintained at the Subcontractors office. Additional safety meetings addressing site-specific hazards may be required in conjunction with the use of a job safety analysis. Such additional meetings or briefings shall be documented. The subcontractor shall ensure that any employee who arrives to work after conduct of the safety meeting is briefed on the content of the meeting prior to going to work.
- 20.8.4 The Subcontractor The Subcontractor may request the Contractor's assistance at Subcontractor safety meetings.

### 21 SUBCONTRACTOR LOWER-TIERS

The Subcontractor shall furnish the Contractor with a copy or copies of any or all lower-tier subcontracts for performance of the work under this subcontract as requested by the Contractor. If the Contractor determines that any lower-tier subcontractor is incompetent or undesirable, he will notify the Subcontractor accordingly and immediate steps will be taken for cancellation of such lower-tier subcontract. Nothing contained in this subcontract shall create any contractual relationship between any lower-tier subcontractor and the Contractor.

### 22 VARIATION IN ESTIMATED QUANTITY

- 22.1 The quantity of a unit-priced item in this subcontract is estimated. The final contract amount for unit-priced items shall be determined by multiplication of the bid price by the actual quantities. However, if the actual quantity of the unit-priced item varies more than 25 percent above or below the estimated quantity, either party may demand an equitable adjustment and the parties shall negotiate to determine if an adjustment to the unit price is appropriate. Any equitable adjustment shall be based solely upon any increase or decrease in costs due to the variation 25 percent above or below the

estimated quantity. Unless otherwise negotiated, the Subcontractor shall be reimbursed for all additional work at the original unit-price schedule.

- 22.2 If the quantity variation is such as to cause an increase in the time necessary for completion, the Subcontractor may request, in writing, an extension of time, to be received by the Contract Administrator within ten (10) days from the beginning of the delay, or within such further period as may be granted by the Contract Administrator before the date of final settlement of the subcontract. Upon receipt of a written request for extension, the Contract Administrator shall ascertain the facts and make an adjustment for extending the completion date as, in the judgment of the Contract Administrator, is justified.

## **23 PROSECUTION OF WORK**

- 23.1 Time is of the essence in all phases of the work to be performed by the Subcontractor hereunder. Subcontractor shall begin the work as stated in the articles of the Subcontract Schedule and shall not thereafter interrupt its performance without the prior written approval of the Contractor's Contract Administrator.
- 23.2 Overtime, Sunday, Holiday and Night Work
- 23.2.1 The Subcontractor shall furnish sufficient forces, construction equipment, and shall work such hours, as approved by the Contractor, including night shifts, overtime operations, Sunday, and holiday work as may be required to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the Contractor, the Subcontractor falls behind the progress schedule, the Subcontractor shall take such steps as may be required to improve his progress and the Contractor may direct him to increase the manpower per shift, number of shifts and/or the amount of construction plant, all without additional cost to the Contractor and/or Government.
- 23.2.2 Work Week (see Clause 68)
- 23.2.3 Failure of the Subcontractor to comply with the requirements of the Contractor under this provision shall be grounds for determination by the Contractor that the Subcontractor is not prosecuting the work with such diligence as will ensure completion within the time specified. Upon such determination, the Contractor may terminate the Subcontractor's right to proceed with the work or any separable part thereof, in accordance with Clause 49 entitled "Termination for Default, Damages for Delay, Time Extensions" of this document.

## **24 NOTICE OF LABOR DISPUTES**

- 24.1 If the Subcontractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this subcontract, the Subcontractor shall immediately give notice thereof, including all relevant information, to the Contractor.
- 24.2 The Subcontractor agrees to insert the substance of this clause, including this paragraph (24.2), in any subcontract to which a labor dispute may delay the timely performance of this contract; except that each such subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the Subcontractor shall immediately notify his next higher tier subcontractor, or the Prime Contractor, as the case may be, of all relevant information concerning the disputes.

## **25 CONFIDENTIALITY OF INFORMATION**

- 25.1 To the extent that the work under this subcontract requires that the Subcontractor be given access to confidential or proprietary business, technical, or financial information belonging to the Contractor or other companies, the Subcontractor shall after receipt thereof, treat such information as confidential and agrees not to appropriate such information to its own use or to disclose such information to third parties

unless specifically authorized by the Contractor in writing. The foregoing obligations, however, shall not apply to:

- 25.1.1 Information which, at the time of receipt by the Subcontractor, is in public domain;
  - 25.1.2 Information which is published after receipt thereof by the Subcontractor or otherwise becomes part of the public domain through no fault of the Subcontractor;
  - 25.1.3 Information which the Subcontractor can demonstrate was in its possession at the time of receipt thereof and was not acquired directly or indirectly from the Contractor or other companies;
  - 25.1.4 Information which the Subcontractor can demonstrate was received by it from a third party who did not require the Subcontractor to hold in confidence.
- 25.2 The Subcontractor shall obtain the written agreement, in a form satisfactory to the Contractor upon analysis, of each employee permitted access, whereby the employee agrees that he will not discuss, divulge or disclose any such information or data to any person or entity except those persons within the Subcontractor's organization directly concerned with the performance of the subcontract.
- 25.3 The Subcontractor agrees, if requested by the Contractor to sign an agreement identical, in all material respects, to the provisions of this clause, with each company supplying information to the Subcontractor under this subcontract, and to supply a copy of such agreement to the Contractor. From time to time upon request of the Contractor, the Subcontractor shall supply the Contractor with reports itemizing information received as confidential or proprietary and setting forth the company or companies from which the Subcontractor received such information.
- 25.4 The Subcontractor agrees that upon request by the Contractor it will execute a Contractor approved agreement with any party whose facilities or proprietary data it is given access to or is furnished, restricting use and disclosure of the data or the information obtained from the facilities. Upon request by the Contractor, such an agreement shall also be signed by Subcontractor personnel.

## **26 PERMITS**

- 26.1 The Subcontractor shall procure all necessary permits and licenses, and abide by all applicable laws, regulations, and ordinances of the United States Department of Energy and of the state, territory, and political subdivision in which the work under the subcontract is performed. The Subcontractor shall be similarly responsible for all damages to persons or property arising out of the performance of work hereunder. The Subcontractor shall be responsible for all materials delivered and work performed until completion and acceptance of the entire project, except for any completed portion thereof, which theretofore may have been accepted in writing by the Contractor.
- 26.2 In instances where the performance of the subcontract work involves a DOE license, the provisions of the pertinent license shall prevail over any inconsistent provisions of this subcontract.

## **27 EQUAL OPPORTUNITY**

(The following clause is applicable unless this subcontract is exempt under the rules, regulations, and relevant orders of the Secretary of Labor (41 CFR 60).) During the performance of this subcontract, the Subcontractor agree as follows:

- 27.1 The Subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Subcontractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Subcontractor agrees to post in conspicuous places, available to employees and

applicants for employment, notices to be provided by the Contractor setting forth the provisions of this Equal Opportunity clause.

- 27.2 The Subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of the Subcontractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.
- 27.3 The Subcontractor will send to each labor union or representative of workers with which he has a collective bargaining agreement, other contract or understanding, a notice, to be provided by the Contractor, advising the labor union or workers' representative of the Subcontractor's commitments under this Equal Opportunity clause, and shall post the notice in conspicuous places available to employees and applicants for employment.
- 27.4 The Subcontractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- 27.5 The Subcontractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by DOE and/or Office of Federal Contract Compliance Programs, the Department of Labor, for purposes of investigation to ascertain compliance with such rules, regulations, and orders. Standard Form 100 (EEO-1), or any successor form is the prescribed form to be filed within thirty (30) days following the award, unless filed within twelve (12) months preceding the date of award.
- 27.6 In the event of the Subcontractor's noncompliance with the Equal Opportunity clause of this subcontract or with any of the said rules, regulations, or orders, this subcontract may be canceled, terminated, or suspended, in whole or in part and the Subcontractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended, or by rules, regulations, or orders of the Secretary of Labor, or as otherwise provided by law.
- 27.7 The Subcontractor will include the provisions of paragraphs 27.1 through 27.7 in every lower-tier subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that provisions will be binding upon each lower-tier subcontractor or vendor. The Subcontractor will take such action with respect to any subcontract or purchase order as the Contractor may direct as a means of enforcing such provisions, including actions for non-compliance: Provided, that in the event the Subcontractor becomes involved in, or is threatened with, litigation with a lower-tier subcontractor or vendor as a result of such direction by the Contractor, the Subcontractor may request the Contractor to enter into such litigation to protect the interests of the United States.

## **28 CONVICT LABOR**

In connection with the performance of work under this subcontract, the Subcontractor agrees not to employ any person undergoing sentence of imprisonment, except as provided by Public Law 89-176, September 10, 1965, (18 U.S.C. 4082 (c)(2)) and Executive Order 11755, December 29, 1973.

## **29 COVENANT AGAINST CONTINGENT FEES**

- 29.1 The Subcontractor warrants that no person or selling agency has been employed or retained to solicit or secure this subcontract upon an agreement of understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Subcontractor for the purpose of securing business.
  - 29.1.1 "Bona fide agency," as used in this clause, means an established commercial or selling agency, maintained by Subcontractor for the purpose of securing business, that neither exerts nor

proposes to exert improper influence to solicit or obtain contracts nor holds itself out as being able to obtain any contract or contracts through improper influence.

- 29.1.2 “Bona fide employee,” as used in this clause, means a person, employed by a Subcontractor and subject to the Subcontractor’s supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain contracts nor holds out as being able to obtain any contract or contracts through improper influence.
- 29.1.3 “Contingent fee,” as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a contract.
- 29.1.4 “Improper influence,” as used in this clause, means any influence that induces or tends to induce an employee or officer to give consideration or to act regarding a contract on any basis other than the merits of the matter.
- 29.1.5 For breach or violation of this warranty, the Contractor shall have the right to annul this subcontract without liability or at its discretion to deduct from the subcontract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

- 29.2 Unless otherwise authorized by the Contractor in writing, the Subcontractor shall cause provisions similar to the foregoing to be inserted in all lower-tier subcontracts and purchase orders entered into under this subcontract.

### **30 OFFICIALS NOT TO BENEFIT**

No member of, or delegate to, Congress or resident Commissioner shall be admitted to any share or part of this subcontract or to any benefit that may arise there from; but this provision shall not be construed to extend to this subcontract if made with a corporation for its general benefit.

### **31 UTILIZATION OF SMALL BUSINESS CONCERNS**

- 31.1 It is the policy of the United States that small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns.
- 31.2 The Subcontractor hereby agrees to carry out this policy in the awarding of lower tier subcontracts to the fullest extent consistent with efficient contract performance. The Subcontractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the Subcontractor's compliance with this clause.

### **32 RESERVED**

### **33 RESERVED**

### **34 RESERVED**

### **35 RESERVED**



## 36 SUPERINTENDENCE BY SUBCONTRACTOR

- 36.1 The Subcontractor shall have a competent foreman or superintendent, with authority to act for the Subcontractor, and satisfactory to the Contractor, on the work site at all times during performance of such subcontract work, until the work is completed and accepted. The superintendent shall have full responsibility and authority for the Subcontractor's safety program. The responsible superintendent shall be designated in writing, along with any individuals having authority to act in the absence of the named superintendent.
- 36.2 The Subcontractor shall be responsible for the superintendence of all lower-tier subcontractors and shall assume full responsibility for their actions. The Subcontractor shall insure that all articles and clauses of this subcontract specifically stated as being applicable to lower-tier subcontractors are complied with by those lower-tier subcontractors, and shall require all lower-tier subcontractors and trades to cooperate and fully coordinate their work with one another for the purpose of completing a professionally finished project within the performance period.

## 37 AFFIRMATIVE ACTION FOR DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA, FAR 52.222-35 (APR 1998) (As Modified By DOE HQ 99-03) (MAY 1999)

- 37.1 Definitions. As used in this clause
- 37.1.1 "All employment openings" includes all positions except executive and top management, those positions that will be filled from within the Subcontractor's organization, and positions lasting 3 days or less. This term includes full-time employment, temporary employment of more than 3 days' duration, and part-time employment.
- 37.1.2 "Appropriate office of the State employment service system," means the local office of the Federal-State national system of public employment offices with assigned responsibility to serve the area where the employment opening is to be filled, including the District of Columbia, Guam, the Commonwealth of Puerto Rico, and the Virgin Islands.
- 37.1.3 "Positions that will be filled from within the Subcontractor's organization" means employment openings for which no consideration will be given to persons outside the Subcontractor's organization (including any affiliates, subsidiaries, and parent companies) and includes any openings that the Subcontractor proposes to fill from regularly established "recall" lists. The exception does not apply to a particular opening once an employer decides to consider applicants outside of its organization.
- 37.1.4 "Veteran of the Vietnam" era means a person who—
- 37.1.4.1 Served on active duty for a period of more than 180 days, any part of which occurred between August 5, 1964, and May 7, 1975, and was discharged or released there from with other than a dishonorable discharge; or
- 37.1.4.2 Was discharged or released from active duty for a service-connected disability if any part of such active duty was performed between August 5, 1964 and May 7, 1975.
- 37.2 General.
- 37.2.1 Regarding any position for which the employee or applicant for employment is qualified, the subcontractor shall not discriminate against the individual because the individual is a disabled veteran or a veteran of the Vietnam era. The Subcontractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified disabled veterans and veterans of the Vietnam era without discrimination based upon their disability or veterans' status in all employment practices such as –

- 37.2.1.1 Employment;
  - 37.2.1.2 Upgrading;
  - 37.2.1.3 Demotion or transfer;
  - 37.2.1.4 Recruitment;
  - 37.2.1.5 Advertising;
  - 37.2.1.6 Layoff or termination;
  - 37.2.1.7 Rates of pay or other forms of compensation; and
  - 37.2.1.8 Selection for training, including apprenticeship.
- 37.2.2 The Subcontractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor (Secretary) issued under the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (the Act), as amended.
- 37.3 Listing openings
- 37.3.1 The Subcontractor agrees to list all employment openings existing at subcontract award or occurring during subcontract performance, at an appropriate office of the State employment service system in the locality where the opening occurs. These openings include those occurring at any Subcontractor facility, including one not connected with performing this subcontract. An independent corporate affiliate is exempt from this requirement.
  - 37.3.2 State and local government agencies holding federal contracts of \$25,000 or more shall also list all employment openings with the appropriate office of the State employment service.
  - 37.3.3 The listing of employment openings with the State employment service system is required at least concurrently with using any other recruitment source or effort and involves the obligations of placing a bona fide job order, including accepting referrals of veterans and nonveterans. This listing does not require hiring any particular job applicant or hiring from any particular group of job applicants and is not intended to relieve the Subcontractor from any requirements of Executive orders or regulations concerning nondiscrimination in employment.
  - 37.3.4 Whenever the Subcontractor becomes contractually bound to the listing terms of this clause, it shall advise the State employment service system, in each State where it has establishments, of the name and location of each hiring location in the State. As long as the Subcontractor is contractually bound to these terms and has so advised the State system, it need not advise the State system of subsequent contracts. The Subcontractor may advise the State system when it is no longer bound by this subcontract clause.
- 37.4 Applicability.
- 37.4.1 This clause does not apply to the listing of employment openings that occur and are filled outside the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
  - 37.4.2 The terms of paragraph (c) above of this clause do not apply to openings that the Subcontractor proposes to fill from within its own organization or under a customary and traditional employer-union hiring arrangement. This exclusion does not apply to a particular opening once an employer decides to consider applicants outside of its own organization or employer-union arrangement for that opening.
- 37.5 Postings.
- 37.5.1 The Subcontractor agrees to post employment notices stating

- 37.5.1.1 The Subcontractor's obligation under the law to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era, and
  - 37.5.1.2 The rights of applicants and employees.
  - 37.5.1.3 These notices shall be posted in conspicuous places that are available to employees and applicants for employment. They shall be in a form prescribed by the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor (Deputy Assistant Secretary), and provided by or through the CO.
  - 37.5.1.4 The Subcontractor shall notify each labor union or representative of workers with which it has a collective bargaining agreement or other subcontract understanding, that the Subcontractor is bound by the terms of the Act, and is committed to take affirmative action to employ, and advance in employment, qualified disabled veterans and veterans of the Vietnam era.
- 37.6 Noncompliance.
- 37.6.1 If the Subcontractor does not comply with the requirements of this clause, appropriate actions may be taken under the rules, regulations, and relevant orders of the Secretary issued pursuant to the Act.
- 37.7 Sub tier Subcontracts.
- 37.7.1 The Subcontractor shall include the terms of this clause in every subcontract or purchase order of \$25,000 or more unless exempted by rules, regulations, or orders of the Secretary. The Subcontractor shall act as specified by the Deputy Assistant Secretary to enforce the terms, including action for noncompliance.

### **38 AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS**

(This clause is applicable if this subcontract is in excess of \$2,500.)

- 38.1 The Subcontractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The Subcontractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
- 38.2 The Subcontractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Rehabilitation Act of 1973 (29 U.S.C. 793)(the Act).
- 38.3 In the event of the Subcontractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.
- 38.4 The Subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, Office of Federal Contract Compliance Programs, Department of Labor, provided by or through the Contractor. Such notices shall state the Subcontractor's obligation under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.
- 38.5 The Subcontractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Subcontractor is bound by the

terms of Section 503 of the Act and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

- 38.6 The Subcontractor will include the provisions of this clause in every lower-tier subcontract or purchase order of \$2,500 or more unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 503 of the Act, so that such provisions will be binding upon each lower-tier subcontractor or vendor. The Subcontractor will take such action with respect to any subcontract or purchase order as the Director, Office of Federal Contract Compliance Programs, may direct to enforce such provisions, including action for noncompliance.

### **39 AFFIRMATIVE ACTION COMPLIANCE REQUIREMENTS FOR CONSTRUCTION**

#### **39.1 Definitions**

39.1.1 "Covered area," as used in this clause, means Director, Office of Federal Contract Compliance Programs (OFCCP), United States Department of Labor, or any person to whom the Director delegates authority.

39.1.2 "Employer identification number," as used in this clause, means the Federal Security number used on the employer's quarterly federal tax return, U. S. Treasury Department Form 941.

39.1.3 "Minority," as used in this clause, means—

39.1.3.1 American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification.)

39.1.3.2 Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

39.1.3.3 Black (all persons having origins in any of the black African racial groups not of Hispanic origin);

39.1.3.4 Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race).

39.2 If the Subcontractor, or a subcontractor of any tier, subcontracts a portion of the work involving any construction trade, each such subcontract in excess of \$10,000 shall include this clause and the Notice containing the goals for minority and female participation stated in the solicitation for this subcontract.

39.3 If the Subcontractor is participating in a Hometown Plan (41 CFR 60-4) approved by the U. S. Department of Labor in a covered area (including goals) it shall comply with the plan for those trades that have unions participating in the plan. Subcontractors must be able to demonstrate participation in, and compliance with, the provision of the plan. Each Subcontractor or lower-tier subcontractor participating in an approved plan is also required to comply with its obligations under the Equal Opportunity clause, and to make a good faith effort to achieve each goal under the plan in each trade in which it has employees. The overall good-faith performance by other contractors or subcontractors toward a goal in an approved plan does not excuse any Subcontractor's failure to make good-faith efforts to achieve the plan's goals.

39.4 The Subcontractor shall implement the affirmative action procedures in subparagraphs (39.7.1) through (39.7.16) of this clause. The goals stated in the solicitation for this subcontract are expressed as percentages of the total hours of employment and training of minority and female utilization that the Subcontractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. If the Subcontractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for the geographical area where that work is actually performed. The Subcontractor is expected to make substantially uniform progress toward its goals in each craft.

- 39.5 Neither the terms and conditions of any collective bargaining agreement, nor the failure by a union with which the Subcontractor has a collective bargaining agreement, to refer minorities or women shall excuse the Subcontractor's obligations under this clause, Executive Order 11246, as amended, or the regulations hereunder.
- 39.6 In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, apprentices and trainees must be employed by the Subcontractor during the training period, and the Subcontractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U. S. Department of Labor.
- 39.7 The Subcontractor shall take affirmative action to ensure equal employment opportunity. The evaluation of the Subcontractor's compliance with this clause shall be based upon its effort to achieve maximum results from its actions. The Subcontractor shall document these efforts fully and implement affirmative action steps at least as extensive as the following:
- 39.7.1 Ensure a working environment free of harassment, intimidation, and coercion at all sites and in all facilities where the Subcontractor's employees are assigned to work. The Subcontractor, if possible, will assign two or more women to each construction project. The Subcontractor shall ensure that foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Subcontractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at these sites or facilities.
- 39.7.2 Establish and maintain a current list of sources for minority and female recruitment. Provide written notification to minority and female recruitment sources and community organizations when the Subcontractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.
- 39.7.3 Establish and maintain a current file of the names, addresses, and telephone numbers of each minority and female off-the-street applicant, referrals of minorities of females from unions, recruitment sources, or community organizations, and the action taken with respect to each individual. If an individual was sent to the union hiring hall for referral and not referred back to the Subcontractor by the union or, if referred back, not employed by the Subcontractor, this shall be documented in the file, along with whatever additional actions the Subcontractor may have taken.
- 39.7.4 Immediately notify the Director, OFCCP, when the union or unions with which the Subcontractor has a collective bargaining agreement has not referred back to the Subcontractor, or when the Subcontractor has other information that the union referral process has impeded the Subcontractor's efforts to meet its obligations.
- 39.7.5 Develop on-the-job training opportunities and/or participate in training programs for the area that expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Subcontractor's employment needs, especially those programs funded or approved by the Department of Labor. The Subcontractor shall provide notice of these programs to the sources compiled under subparagraph (39.7.2) above
- 39.7.6 Disseminate the Subcontractor's equal employment policy by
- 39.7.6.1 providing notice of the policy to unions and to training, recruitment, and outreach programs, and requesting their cooperation in assisting the Subcontractor in meeting its subcontract obligations;
- 39.7.6.2 including the policy in any policy manual and in collective bargaining agreements;
- 39.7.6.3 publicizing the policy in the company newspaper, annual report, etc.;
- 39.7.6.4 reviewing the policy with all management personnel and with all minority and female employees at least once a year; and

- 39.7.6.5 posting the policy on bulletin boards accessible to employees at each location where construction work is performed.
- 39.7.7 Review, at least annually, the Subcontractor's equal employment policy and affirmative action obligations with all employees having responsibility for hiring, assignment, layoff, termination, or other employment decisions. Conduct review of this policy with all on-site supervisory personnel before initiating construction work at a job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
- 39.7.8 Disseminate the Subcontractor's equal employment policy externally by including it in any advertising in the news media, specifically including minority and female news media. Provide written notification to, and discuss this policy with, other contractors and subcontractors with which the Subcontractor does or anticipates doing business.
- 39.7.9 Direct recruitment efforts, both oral and written, to minority, female, and community organizations, to schools with minority and female students, and to minority and female recruitment and training organizations serving the Subcontractor's recruitment area and employment needs. Not later than one (1) month before the date for acceptance of applications for apprenticeship or training by any recruitment source, send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.
- 39.7.10 Encourage present minority and female employees to recruit minority persons and women. Where reasonable, provide after-school, summer, and vacation employment to minority and female youth both on the site and in other areas of the Subcontractor's workforce.
- 39.7.11 Validate all tests and other selection requirements where required under 41 CFR 60-3.
- 39.7.12 Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities. Encourage these employees to seek or to prepare for, through appropriate training, etc., opportunities for promotion.
- 39.7.13 Ensure that seniority practices job classification, work assignments, and other personnel practices do not have a discriminatory effect by continually monitoring all personnel and employment-related activities to ensure that the Subcontractor's obligations under this subcontract are being carried out.
- 39.7.14 Ensure that all facilities and company activities are nonsegregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.
- 39.7.15 Maintain a record of solicitations for subcontracts for minority and female construction subcontractors and suppliers, including circulation of solicitations to minority and female subcontractor associations and other business associations.
- 39.7.16 Conduct a review, at least annually, of all supervisors' adherence to and performance under the Subcontractor's equal employment policy and affirmative action obligations.
- 39.8 The Subcontractor is encouraged to participate in voluntary association that may assist in fulfilling one or more of the affirmative action obligations contained in subparagraphs (39.7.1) through (39.7.16), provided the Subcontractor:
  - 39.8.1 Actively participates in the group;
  - 39.8.2 Makes every effort to ensure that the group has a positive impact on the employment of minorities and women in the industry;
  - 39.8.3 Ensures that concrete benefits of the program are reflected in the Subcontractor's minority and female workforce participation;
  - 39.8.4 Makes a good-faith effort to meet its individual goals and timetables; and

- 39.8.5 Can provide access to documentation that demonstrates the effectiveness of action taken on behalf of the Subcontractor. The obligation to comply is the Subcontractor's, and failure of such a group to fulfill an obligation shall not be a defense for the Subcontractor's noncompliance.
- 39.9 A single goal for minorities and a separate single goal for women shall be established. The Subcontractor is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and nonminority. Consequently, the Subcontractor may be in violation of Executive Order 11246, as amended, if a particular group is employed in a substantially disparate manner.
- 39.10 The Subcontractor shall not use goals or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.
- 39.11 The Subcontractor shall not enter into any subcontract with any person or firm debarred from Government subcontracts under Executive Order 11246, as amended.
- 39.12 The Subcontractor shall carry out such sanctions and penalties for violation of this clause and of the Equal Opportunity clause, including suspension, termination, and cancellation of existing subcontracts, as may be imposed or ordered under Executive Order 11246, as amended, and its implementing regulations, by the OFCCP. Any failure to carry out these sanctions and penalties as ordered shall be a violation of this clause and Executive Order 11246, as amended.
- 39.13 The Subcontractor in fulfilling its obligations under this clause shall implement affirmative action procedures at least as extensive as those prescribed in paragraph (39.7) above, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Subcontractor fails to comply with the requirements of Executive Order 11246, as amended, the implementing regulations, or this clause, the Director, OFCCP, shall take action as prescribed in 41 CFR 60-4.8.
- 39.14 The Subcontractor shall designate a responsible official to:
- 39.14.1 Monitor all employment-related activity to ensure that the Subcontractor's equal employment policy is being carried out;
- 39.14.2 Submit reports as may be required by the Government; and
- 39.14.3 Keep records that shall at least include for each employee the name, address, telephone number, construction trade, union affiliation (if any), employee identification number, social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, separate records are not required to be maintained.
- 39.15 Nothing contained herein shall be construed as a limitation upon the application of other laws that establish different standards of compliance or upon the requirements for the hiring of local or other area residents (e.g., those under the Public Work Employment Act of 1977 and the Community Development Block Grant Program).

#### **40 TECHNICAL PROVISIONS: STATEMENTS OF WORK, DRAWINGS AND GENERAL**

- 40.1 The Subcontractor shall keep on the work site a copy of the Technical Provisions (which includes the Statement of Work, drawings and the general specifications) and shall at all times give the Contractor access thereto. In case of conflict between the Terms and Conditions for Construction Subcontracts with Small Businesses and the Technical Provisions, the former shall govern. In case of difference between drawings and General Specifications, the drawings shall govern. In case of discrepancy either in the Statement of Work, figures, drawings, or General Specifications, the matter shall be promptly

submitted to the Contractor, who shall promptly make a determination to resolve the discrepancy in writing. Any adjustment by the Subcontractor without such a determination shall be at its own risk and expense. The Contractor shall furnish from time to time such detailed drawings and other information as it may consider necessary, unless otherwise provided.

40.2 The latest revisions (current 30 calendar days prior to the time of the bid opening specified in the Invitation for Bid) of specifications, publications or standards of the Federal Government, technical societies, or testing organizations included in the Technical Provisions by reference shall govern.

40.3 All requirements of the Technical Provisions are applicable to the lower-tier subcontractors at any level.

#### **41 CONDITIONS AFFECTING THE WORK**

The Subcontractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions, such as normal weather, water tables, roads, utilities, etc., which can affect the work or the cost thereof. The Subcontractor also acknowledges that it has satisfied itself as to the character, difficulty, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Contractor, as well as from the drawings and specifications made a part of this subcontract. Any failure by the Subcontractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Contractor. The Contractor assumes no responsibility for any understanding or representations concerning conditions made by any of its employees or agents prior to the execution of this subcontract, unless such understanding or representations by the Contractor are expressly stated in the subcontract.

#### **42 DIFFERING SITE CONDITIONS**

42.1 The Subcontractor shall promptly, and before such conditions are disturbed, notify the Contractor in writing of:

42.1.1 Subsurface or latent physical conditions at the site differing materially from those indicated in this subcontract, or

42.1.2 Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this subcontract. The Contractor shall promptly investigate the conditions, and if it finds that such conditions do materially so differ and cause an increase or decrease in the Subcontractor's cost of, or the time required for, performance of any part of the work under this subcontract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the subcontract modified in writing accordingly.

42.2 No claim of the Subcontractor under this clause shall be allowed unless the Subcontractor has given the notice required in clause 42.1 above; provided, however, the time prescribed therefore may be extended by the Contractor.

42.3 No claim of the Subcontractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this subcontract.

#### **43 CLEAN AIR AND WATER**

(This clause is only applicable if the subcontract is in excess of \$100,000.)

43.1 The Subcontractor agrees:

43.1.1 To comply with all the requirements of Section 114 of the Clean Air Act (42 U.S.C. 7414) and Section 308 of the Clean Water Act (33 U.S.C. 1318) relating to inspection, monitoring, entry reports, and information, as well as other requirements specified in Section 114 and Section 308 of the Air Act and the Water Act, and all regulations and guidelines issued to implement those acts before the award of this subcontract, and



- 43.1.2 That no portion of the work required by this subcontract will be performed in a facility listed on the Environmental Protection Agency (EPA) List of Violating Facilities on the date when this subcontract was awarded unless and until the EPA eliminates the name of the facility from the listing, and
- 43.1.3 To use best efforts to comply with clean air standards and clean water standards at the facility in which the subcontract is being performed.
- 43.1.4 To insert the substance of this clause into any nonexempt subcontract, including this paragraph.
- 43.2 Definitions: Clean Air and Water
  - 43.2.1 "Air Act," as used in this clause, means the Clean Air Act (42 U.S.C. 7401 et seq.)
  - 43.2.2 "Clean Air Standards," as used in this clause, means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, work practices, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive Order 11738.
  - 43.2.3 "Clean Water Standards," as used in this clause, means any enforceable limitation, control, condition, prohibition, standard, or other requirement promulgated under the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by Section 402 of the Water Act (33 U.S.C. 1342), or by a local Government to ensure compliance with pretreatment regulations as required by Section 307 of the Water Act (33 U.S.C. 1317).
  - 43.2.4 "Compliance," as used in this clause, means compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Agency, or an air or water pollution control agency under the requirements of the Air Act or Water Act and related regulations.
  - 43.2.5 "Facility," as used in this clause, means any building, plant, installation, structure, mine, vessel, or other floating craft, location, or site of operations, owned, leased, or supervised by a Subcontractor, used in the performance of a contract or subcontract. When a location or site of operations includes more than one building, plant, installation, or structure, the entire location or site shall be deemed a facility except where the Administrator or a designee, of the Environmental Protection Agency, determined that independent facilities are collocated in one geographical area.
  - 43.2.6 "Water Act," as used in this clause, means Clean Water Act (33 U.S.C. 1252 et seq.).

#### **44 HAZARDOUS SUBSTANCES/HAZARDOUS WASTES**

- 44.1 The Subcontractor represents that it is familiar with Environmental Protection Agency regulations, published at 40 CFR Part 302, regarding notification requirements for releases of reportable quantities of hazardous substances. Should any reportable release of a hazardous substance occur during the Subcontractor's work under this subcontract, it shall notify the National Response Center as required by law and also shall immediately notify the Contractor.
- 44.2 The Subcontractor represents that it is familiar with Environmental Protection Agency regulations, published at 40 CFR Part 261, and Colorado regulations, published at 6 CCR 1007-3, defining the term "hazardous waste." If the Subcontractor at any time while performing work under this subcontract encounters material mixed with residual radioactive materials and the Subcontractor knows or has reason to believe that the material is or may be hazardous waste, the Subcontractor shall not handle or disturb such material until notifying the Contractor and receiving further instructions regarding how to proceed. If the Subcontractor at any time while performing work under this subcontract encounters material not mixed with residual radioactive materials and the Subcontractor knows or has reason to believe that the material is or may be hazardous waste, the Subcontractor understands that any action with respect to such material is outside the scope of this subcontract and it shall not handle or take any action with respect to such material unless specifically authorized to proceed in writing by the Contractor.

- 44.3 If the work to be performed by the Subcontractor under this subcontract involves the handling or removal of material containing both radioactive materials and hazardous waste or hazardous substances, the Subcontractor shall not perform work until the Contractor shall have arranged for disposal or treatment of such material in accordance with applicable law.

#### **45 TERMINATION FOR CONVENIENCE**

- 45.1 The performance of work under this subcontract may be terminated by the Contractor when determined to be in the best interest of the Government in accordance with this clause in whole, or from time to time, in part, the Contractor determines that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Subcontractor of a Notice of Termination specifying the extent to which performance of work under the subcontract is terminated, and the date upon which such termination becomes effective.
- 45.2 After receipt of a Notice of Termination, and except as otherwise directed by the Contractor, the Subcontractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:
- 45.2.1 Stop work under the subcontract on the date and to the extent specified in the Notice of Termination;
  - 45.2.2 Place no further orders or subcontracts for materials, services, or facilities, except as may be necessary for completion of such portion of the work under the subcontract as is not terminated;
  - 45.2.3 Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;
  - 45.2.4 Assign to the Contractor, in the manner, at the times, and to the extent directed by the Contractor, all of the right, title and interest of the Subcontractor under the orders and subcontracts so terminated, in which case the Contractor shall have the right, at its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;
  - 45.2.5 Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contractor, to the extent he may require, which approval or ratification shall be final for the purposes of this clause;
  - 45.2.6 Transfer title to the Contractor and deliver in the manner, at the times, and to the extent, directed by the Contractor, of
    - 45.2.6.1 the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and
    - 45.2.6.2 the completed or partially completed plans, drawings, information and other property which, if the subcontract had been completed, would have been required to be furnished to the Contractor;
  - 45.2.7 Use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contractor, any property of the types referred to in subparagraph 45.2.6.1 above; provided, however, that the Contractor.
    - 45.2.7.1 Shall not be required to extend credit to any purchaser, and
    - 45.2.7.2 May acquire any such property under the conditions prescribed by and at a price or prices approved by the Contractor: And provided further, that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Contractor to the Subcontractor under this subcontract or shall otherwise be credited to the price or cost of the work covered by this subcontract or paid in such other manner as the Contractor may direct;

- 45.2.8 Complete the performance of such part of the work as shall not have been terminated by the Notice of Termination; and
  - 45.2.9 Take such action as may be necessary, or as the Contractor may direct, for the protection and preservation of the property related to this subcontract which is in the possession of the Subcontractor and in which the Contractor or the Government has or may acquire an interest.
  - 45.2.10 After termination, the Subcontractor may submit to the Contractor a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contractor, and may request the Contractor to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Contractor will accept title to such items and remove them or enter into a storage agreement covering the same: Provided, that the list submitted shall be subject to verification by the Contractor upon removal of the items or, if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.
- 45.3 After receipt of a Notice of Termination, the Subcontractor shall submit to the Contractor his termination claim, in the form and with certification prescribed by the Contractor. Such claims shall be submitted promptly but in no event later than six months from the effective date of termination, unless one or more extensions in writing are granted by the Contractor upon request of the Subcontractor made in writing within such six month period or authorized extension thereof. However, if the Contractor determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such six-month period or any extension thereof. Upon failure of the Subcontractor to submit his termination claim within the time allowed, the Contractor may determine, on the basis of information available to him, the amount, if any, due to the Subcontractor by reason of the termination and shall thereupon pay to the Subcontractor the amount so determined.
- 45.4 Subject to the provisions of paragraph 45.3, and subject to any review required by the Contractor's procedures in effect as of the date of execution of this subcontract, the Subcontractor and the Contractor may agree upon the whole or any part of the amount or amounts to be paid to the Subcontractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done, provided, that such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total subcontract price as reduced by the amount of payments otherwise made and as further reduced by the subcontract price of work not terminated. The subcontract shall be amended accordingly, and the Subcontractor shall be paid the agreed amount. Nothing in paragraph 45.5 of this clause, prescribing the amount to be paid to the Subcontractor in the event of failure of the Subcontractor and the Contractor to agree upon the whole amount to be paid to the Subcontractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Subcontractor pursuant to this paragraph 45.4.
- 45.5 In the event of the failure of the Subcontractor and the Contractor to agree as provided in paragraph 45.4 upon the whole amount to be paid to the Subcontractor by reason of the termination of work pursuant to this clause, the Contractor shall determine, on the basis of information available to him, the amount, if any, due to the Subcontractor by reason of the termination and shall pay to the Subcontractor the amounts determined as follows:
- 45.5.1 For completed supplies accepted by the Contractor (or sold or acquired as provided in subparagraph 45.2.7 above) and not theretofore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the subcontract, appropriately adjusted for any saving of freight or other charges;
  - 45.5.2 The total of:
    - 45.5.2.1 the costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under subparagraph 45.5.1 hereof; and

- 45.5.2.2 the cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in subparagraph 45.2.5 above, which are properly chargeable to the terminated portion of the subcontract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts shall be included in the costs payable under subparagraph 45.5.2.1 above); and
  - 45.5.2.3 a sum, as profit on subparagraphs 45.5.2.1 above, determined by the Contractor to be fair and reasonable: Provided, however, that if it appears that the Subcontractor would have sustained a loss on the entire subcontract had it been completed, no profit shall be included or allowed under this subparagraph 45.5.2.3 and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and
  - 45.5.2.4 the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the subcontract and for the termination and settlement of lower-tier subcontracts hereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this subcontract.
- 45.6 The total sum to be paid to the Subcontractor under subparagraphs 45.5.1 and 45.5.2 of paragraph 45.5 shall not exceed the total subcontract price as reduced by the amount of payments otherwise made and as further reduced by the subcontract price of work not terminated. Except for normal spoilage, and except to the extent that the Contractor shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Subcontractor as provided in subparagraph 45.5.1 and subparagraph 45.5.2.1 above, the fair value, as determined by the Contractor, or property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Contractor, or to a Buyer pursuant to subparagraph 45.2.7.
- 45.7 Costs claimed, agreed to, or determined pursuant to paragraphs 45.3, 45.4, and 45.5 of this clause shall be in accordance with the applicable standard contract cost principles and procedures in effect on the date of this subcontract.
- 45.8 The Subcontractor shall have the right to appeal, under the clause of this subcontract entitled "Disputes," any determination made by the Contractor. In any case where the Contractor has made a determination of the amount due under paragraph 45.3 or 45.5 above, the Contractor shall pay to the Subcontractor the following:
- 45.8.1 If there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contractor, or
  - 45.8.2 If an appeal has been taken, the amount finally determined by the courts.
- 45.9 In arriving at the amount due the Subcontractor under this clause there shall be deducted
- 45.9.1 All unliquidated advance or other payments on account theretofore made to the Subcontractor, applicable to the terminated portion of this subcontract;
  - 45.9.2 Any claim which the Contractor may have against the Subcontractor in connection with this subcontract, and
  - 45.9.3 The agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Subcontractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Contractor.
- 45.10 If the termination hereunder be partial, prior to the settlement of the terminated portion of this subcontract, the Subcontractor may file with the Contractor, within 90 days from Termination Notice, a

request in writing for an equitable adjustment of the price or prices specified in the subcontract relating to the continued portion of the subcontract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

- 45.11 The Contractor may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Subcontractor in connection with the terminated portion of this subcontract whenever in the opinion of the Contractor the aggregate of such payments shall be within the amount to which the Subcontractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Subcontractor to the Contractor upon demand, together with interest computed at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (50 U.S.C. App. 12.5(b)(2)) for the period from the date such excess payment is received by the Subcontractor to the date on which such excess is repaid to the Contractor: Provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Subcontractor's claim by reason of retention or other disposition of termination inventory until ten (10) days after the date of such retention or disposition, or such later date as determined by the Contractor by reason of the circumstances.
- 45.12 Unless otherwise provided for in this subcontract, or by applicable statute, the Subcontractor, from the effective date of termination and for a period of three (3) years after final settlement under this subcontract, shall preserve and make available to the Contractor or the Government at all reasonable times at the office of the Subcontractor but without direct charge to the Contractor or the Government, all his books, records, documents, and other evidence bearing on the costs and expenses of the Subcontractor under this subcontract and relating to the work terminated hereunder, or, to the extent approved by the Contractor, photographs, microphotographs, or other authentic reproductions thereof.
- 45.13 If, after Notice of Termination of this subcontract under the provisions of this clause, it is determined for any reason that the Subcontractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the subcontract contains a clause providing the termination for convenience of the Government, be the same as if the Notice of Termination had been issued pursuant to such clause. If, after Notice of Termination of this subcontract under the provisions of this clause, it is determined for any reason that the Subcontractor was not in default under the provisions of this clause, and if this subcontract does not contain a clause providing for termination for convenience of the Government, the subcontract shall be equitably adjusted to compensate for such termination and the subcontract modified accordingly; failure to agree to any such adjustment shall be a dispute within the meaning of the clause of this subcontract entitled "Disputes."
- 45.14 The right and remedies of the Contractor provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this subcontract.
- 45.15 As used in paragraph 45.13 of this clause, the terms "Subcontractor" and "Subcontractors" mean Subcontractor(s) at any tier.

**46 RESERVED**

**47 RESERVED**

**48 RESERVED**

**49 TERMINATION FOR DEFAULT-DAMAGES FOR DELAY-TIME EXTENSIONS**

- 49.1 The Contractor may, subject to paragraphs 49.1.1 and 49.1.2 below, by written notice of default to the Subcontractor, terminate this subcontract in whole or in part if the Subcontractor refuses or fails
- 49.1.1 to prosecute the work, or any separable part thereof, with such diligence as will ensure its completion within the time specified in this subcontract, or any extension thereof, or fails to complete said work within such time (see paragraph 49.2 below), or

- 49.1.2 to perform any other of the provisions of this subcontract (see paragraph 49.2 below).
- 49.2 The Contractor's right to terminate this subcontract under paragraphs 49.1.1 and 49.1.2 above may be exercised if the Subcontractor does not cure such failure within 10 days (or more if authorized in writing by the Contractor) after receipt of the notice from the Contractor specifying the failure.
- 49.3 If the Contractor terminates this subcontract in whole or in part it may acquire, under the terms and in the manner the Contractor considers appropriate, supplies or services similar to those terminated, and the Subcontractor will be liable to the Contractor for any excess costs for those supplies or services. Whether or not the Subcontractor's right to proceed with the work is terminated, the Subcontractor and his sureties shall be liable for any damage to the Contractor resulting from his refusal or failure to complete the work within the specified time.
- 49.4 The Subcontractor's right to proceed shall not be so terminated nor the Subcontractor charged with resulting damage if:
- 49.4.1 The delay in the completion of the work arises from unforeseeable causes other than normal weather beyond the control and without the fault or negligence of the Subcontractor. Examples of such causes include but are not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of lower-tier subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Subcontractor and such lower-tier subcontractors or suppliers; and
- 49.4.2 The failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and Subcontractor, and without the fault or negligence of either, the Subcontractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Subcontractor to meet the required delivery schedule.
- 49.4.3 The Subcontractor, within 10 days from the beginning of any such delay (unless the Contractor grants a further period of time before the date of final payment under the subcontract), notifies the Contractor in writing of the causes of delay. The Contractor shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties subject only to appeal as provided in the article of this subcontract entitled "Disputes."
- 49.4.4 The Contractor shall pay contract price for completed supplies delivered and accepted. The Subcontractor and Contractor shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Contractor may withhold from these amounts any sum the Contractor determines to be necessary to protect the Contractor against loss because of outstanding liens or claims of former lien holders.
- 49.5 If the failure to perform is caused by the default of the lower-tier subcontractor, and if the cause of the default is beyond the control of both the Subcontractor and lower-tier subcontractor, and without the fault or negligence of either, the Subcontractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Subcontractor to meet the required delivery schedule.
- 49.6 If fixed and agreed liquidated damages are provided in the subcontract, and if the Contractor so terminates the Subcontractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Contractor in completing the work.

- 49.7 If fixed and agreed liquidated damages are provided in the subcontract and if the Contractor does not so terminate the Subcontractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Contractor in completing the work.
- 49.8 If fixed and agreed liquidated damages are provided in the subcontract and if the Contractor does not so terminate the Subcontractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.
- 49.9 If, after notice of termination of the Subcontractor's right to proceed under the provisions of this clause, it is determined for any reason that the Subcontractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the subcontract contains an article providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such article. If, in the foregoing circumstances, this subcontract does not contain an article providing for termination for convenience of the Government, the subcontract shall be equitably adjusted to compensate for such termination and the subcontract modified accordingly. Failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the article of this subcontract entitled "Dispute."
- 49.10 The rights and remedies of the Contractor provided in this clause are in addition to any other right and remedies provided by law or under this subcontract.

## **50 HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA**

- 50.1 The Subcontractor agrees to submit a Material Safety Data Sheet to the Contract Administrator (Department of Labor Form OSHA-20), as prescribed in Federal Standard No. 313B, for all hazardous materials 5 days before delivery of the material, whether or not listed in Appendix A of the Standard. This obligation applies to all materials delivered under this subcontract, which will involve exposure to hazardous materials or items containing these materials.
- 50.2 "Hazardous material," as used in this clause, is as defined in Federal Standard No. 313B, in effect on the date of this subcontract.
- 50.3 Neither the requirements of this clause nor any act or failure to act by the Contractor shall relieve the Subcontractor of any responsibility or liability for the safety of Government, Contractor, or Subcontractor personnel or property.
- 50.4 Nothing contained in this clause shall relieve the Subcontractor from complying with applicable Federal, state and local laws, codes, ordinances, and regulations (including the obtaining of licenses and permits) in connection with hazardous material.
- 50.5 The Contractor's rights in data furnished under this subcontract with respect to hazardous material are as follows:
- 50.5.1 To use, duplicate, and disclose any data to which this clause is applicable. The purposes of this right are to
- 50.5.1.1 apprise personnel of the hazards to which they may be exposed in using, handling, packaging, transporting, or disposing of hazardous materials;
- 50.5.1.2 obtain medical treatment for those affected by the material; and
- 50.5.1.3 have others use, duplicate, and disclose the data for the Contractor for these purposes.

- 50.5.2 To use, duplicate, and disclose data furnished under this clause, in accordance with subparagraph 50.5.1 above, in precedence over any other clause of this subcontract providing for rights in data.
- 50.5.3 That the Contractor is not precluded from using similar or identical data acquired from other sources.
- 50.5.4 That the data shall not be duplicated, disclosed, or released outside by the Contractor, in whole or in part for any acquisition or manufacturing purpose, if the following legend is marked on each piece of data to which this clause applies—  
  
 “This is furnished under Subcontract No. .... and shall not be used, duplicated, or disclosed for any acquisition or manufacturing purpose without the permission of ..... This legend shall be marked on any reproduction of this data.”
- 50.5.5 That the Subcontractor shall not place the legend or any other restrictive legend on any data which
  - 50.5.5.1 the Subcontractor or any lower tier subcontractor previously delivered to the Contractor without limitations or
  - 50.5.5.2 should be delivered without limitations.
- 50.6 The Subcontractor shall insert this clause, including this paragraph 50.6 with appropriate changes in the designation of the parties, in subcontracts at any tier (including purchase designations or purchase orders) under this subcontract involving hazardous material.

## **51 AUTHORIZATION AND CONSENT**

The Government has given its authorization and consent to the Contractor and its Subcontractors (without prejudice to any rights of indemnification) for all use and manufacture, in the performance of this subcontract or any part hereof or any amendment hereto or any lower-tier subcontract, of any invention described in and covered by a patent of the United States:

- 51.1 Embodied in the structure or composition of any clause the delivery of which is accepted by the Contractor under this subcontract or
- 51.2 Utilized in the machinery, tools, or methods the use of which necessarily results from compliance by the Subcontractor with
  - 51.2.1 specification or written provisions now or hereafter forming a part of this subcontract, or
  - 51.2.2 specific written instructions given by the Contractor directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determine solely by the provisions of the indemnity clauses, if any, included in this subcontract or any lower-tier subcontract hereunder, and the Government assumes liability for all other infringements to the extent of the authorization and consent hereinabove granted.

## **52 INSPECTION AND ACCEPTANCE**

- 52.1 The Contractor and DOE through any authorized representatives shall have the right, at all reasonable times, to observe or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any observation or evaluation is made by the Contractor or DOE of the Subcontractor or a Subcontractor of any lower-tier, the Subcontractor shall provide and shall require its subcontractors of any lower-tier to provide all reasonable facilities and assistance for the safety and convenience of the Contractor's or DOE's representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the work. Any inspection by the Contractor or DOE of the work to be performed under this subcontract does not constitute or imply acceptance so as to relieve the Subcontractor or its lower-tier subcontractors from any responsibility regarding defects or other failures to meet the subcontract



requirements, or relieve the Subcontractor or its lower-tier subcontractors of any responsibilities under any warranty included in this subcontract.

- 52.2 The presence or absence of a Construction Inspector does not relieve the Contractor from any subcontract requirement.
  - 52.2.1 The Subcontractor shall promptly furnish, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contractor. The Contractor may charge to the Subcontractor any additional cost of inspection or test when work is not ready at the time specified by the Subcontractor for inspection or test or when prior rejection makes reinspection or retest necessary. The Contractor shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the subcontract.
  - 52.2.2 The Subcontractor shall, without charge, replace or correct work found by the Contractor not to conform to subcontract requirements, unless in the public interest the Contractor consents to accept the work with an appropriate adjustment in subcontract price. The Subcontractor shall promptly segregate and remove rejected material from the work site.
  - 52.2.3 If the Subcontractor does not promptly replace or correct rejected work, the Contractor may
    - 52.2.3.1 by contract or otherwise, replace or correct the work and charge the cost to the Subcontractor or
    - 52.2.3.2 terminate for default the Subcontractor's right to proceed.
  - 52.2.4 If, before acceptance of the entire work, the Contractor decides to examine already completed work by removing it or tearing it out, the Subcontractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Subcontractor or its lower-tier subcontractors, the Subcontractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, the Contractor shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.
  - 52.2.5 Unless otherwise specified in the subcontract, the Contractor shall accept, as promptly as practicable after completion and inspection, all work required by the subcontract or that portion of the work the Contractor determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Contractor's rights under any warranty or guarantee.

### **53 NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT**

- 53.1 The Subcontractor shall report to the Contractor promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this subcontract of which the Subcontractor has knowledge.
- 53.2 In the event of any claim or suit against the Contractor or the Government on account of any alleged patent or copyright infringement arising out of the performance of this subcontract or out of the use of any supplies furnished or work services performed hereunder, the Subcontractor shall furnish to the Contractor upon its request, all evidence and information in possession of the Subcontractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Contractor except where the Subcontractor has agreed to indemnify the Contractor and/or the Government.
- 53.3 This clause, appropriately modified, shall be included in all lower-tier subcontracts issued hereunder.

## 54 WARRANTY OF CONSTRUCTION

- 54.1 In addition to any other warranties in this subcontract, the Subcontractor warrants, except as provided in paragraph 54.10 of this clause, that work performed under this subcontract conforms to the subcontract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Subcontractor or any subcontractor or supplier at any tier.
- 54.2 This warranty shall continue for a period of one (1) year from the date of final inspection and acceptance of the work. If the Contractor accepts any part of the work before final inspection, this warranty shall continue for a period of one (1) year from the date the Contractor accepts the work.
- 54.3 The Subcontractor shall remedy (at the Subcontractor's expense) any failure to conform or any defect. In addition, the Subcontractor shall remedy at the Subcontractor's expense any damage to the property-owner owned or controlled real or personal property, when that damage is the result of
- 54.3.1 the Subcontractor's failure to conform to subcontract requirements, or
- 54.3.2 any defect of equipment, material, workmanship, or design furnished.
- 54.4 The Subcontractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Subcontractor's warranty with respect to work repaired or replaced will run for one (1) year from the date of repair or replacement.
- 54.5 The Contractor shall notify the Subcontractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.
- 54.6 If the Subcontractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Contractor shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Subcontractor's expense.
- 54.7 With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this subcontract, the Subcontractor shall
- 54.7.1 obtain the most favorable warranties that would be given in normal commercial practice,
- 54.7.2 require all warranties to be executed, in writing, for the benefit of the Contractor, if directed by the Contractor.
- 54.7.3 enforce all warranties for the benefit of the Contractor, if directed by the Contractor.
- 54.7.4 furnish to the Contractor copies of all warranties and such warranties shall be deemed part of this subcontract.
- 54.8 In the event the Subcontractor's warranty under paragraph 54.2 of this clause has expired, the Contractor may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty.
- 54.9 Unless a defect is caused by the negligence of the Subcontractor or supplier at any tier, the Subcontractor shall not be liable for the repair of any defects of material or design furnished by the Contractor nor for the repair of any damage that results from any defect in Contractor-furnished material or design.
- 54.10 This warranty shall not limit the Contractor's right under the Inspection and Acceptance clause of this subcontract (Clause 52) with respect to latent defects, gross mistakes, or fraud.

## 55 RIGHTS IN TECHNICAL DATA

### 55.1 Definitions

- 55.1.1 “Technical Data” means recorded information regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software or printouts. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification and related information. Technical data as used herein does not include financial reports, cost analyses, and other information incidental to subcontract administration.
- 55.1.2 “Proprietary Data” means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes or treatments, including minor modifications thereof, provided that such data:
- 55.1.2.1 Are not generally known or available from other sources without obligation concerning their confidentiality;
  - 55.1.2.2 Have not been made available by the owner to others without obligation concerning its confidentiality; and
  - 55.1.2.3 Are not already available to the Contractor and the Government without obligation concerning their confidentiality.
  - 55.1.2.4 “Contract Data” means technical data first produced in the performance of the subcontract, technical data that is specified to be delivered under the subcontract, technical data that may be called for under the “Additional Technical Data Requirements” clause of the subcontract, if any, or technical data actually delivered in connection with the subcontract.
  - 55.1.2.5 “Unlimited Rights” means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

### 55.2 Allocation of Rights

- 55.2.1 The Contractor and the Government shall have:
- 55.2.1.1 Unlimited rights in subcontract data except as otherwise provided below with respect to proprietary data.
  - 55.2.1.2 The right to remove, cancel, correct, or ignore any marking not authorized by the terms of this subcontract on any technical data furnished hereunder, if in response to a written inquiry by the Contractor and DOE concerning the proprietary of the markings, the Subcontractor fails to respond thereto within sixty (60) days or fails to substantiate the proprietary of the markings. In either case, the Contractor and DOE will notify the Subcontractor of the action taken.
  - 55.2.1.3 No rights under this subcontract in any technical data, which are, not subcontract data.
- 55.2.2 The Subcontractor shall have:
- 55.2.2.1 The right to withhold proprietary data in accordance with the provisions of this clause.

- 55.2.2.2 The right to use for its private purposes, subject to patent, security or other provisions of this subcontract, subcontract data it first produces in the performance of this subcontract provided the data requirements of this subcontract have been met as of the date of the private use of such data. The Subcontractor agrees that to the extent it receives or is given access to proprietary data or other technical, business, or financial data in the form of recorded information from DOE or a DOE Contractor or Subcontractor, the Subcontractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the Contractor.
- 55.2.2.3 Nothing contained in this "Rights in Technical Data" clause shall imply a license to the Contractor or the Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

### 55.3 Copyrighted Material

- 55.3.1 The Subcontractor shall not, without prior written authorization of the Contractor, establish a claim to statutory copyright in any subcontract data first produced in the performance of the subcontract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf a royalty-free, non-exclusive, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the Subcontractor.
- 55.3.2 The Subcontractor agrees not to include in the technical data delivered under the subcontract any material copyrighted by the Subcontractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (55.3.1) above. If such royalty-free license is unavailable and the Subcontractor nevertheless determined that such copyrighted material must be included in the technical data to be delivered rather than merely incorporated therein by reference, the Subcontractor shall obtain the written authorization of the Contractor to include such copyrighted material in the technical data without a license.

### 55.4 Subcontracting

It is the responsibility of the Subcontractor to obtain from its lower-tier subcontractors technical data and rights therein, on behalf of the Government, necessary to fulfill the Subcontractor's obligations to the Contractor and the Government with respect to such data. In the event of refusal by a lower-tier subcontractor to accept a clause affording the Government such rights, the Subcontractor shall:

- 55.4.1 Promptly submit written notice to the Contractor setting forth reasons for the lower-tier subcontractor refusal and other pertinent information which may expedite disposition of the matter; and
- 55.4.2 Not proceed with the lower-tier subcontract without the written authorization of the Contractor.

### 55.5 Withholding of Proprietary Data

Notwithstanding the inclusion of the "Additional Technical Data Requirements" clause in this subcontract or any provision of this subcontract specifying the delivery of technical data, the Subcontractor may withhold proprietary data from delivery, provided that the Subcontractor furnishes in lieu of any such proprietary data, so withheld technical data disclosing the source, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ("Form, Fit and Function" data; e.g., specification control drawings, catalog sheets, envelope drawings, etc.) or a general description of such proprietary data where "Form, Fit and Function" data are not applicable. The Contractor or Government shall acquire no rights to any proprietary data so withheld except that such data shall be subject to the "inspection rights" provisions of paragraph (55.6), and, if included, the "limited rights in proprietary data" provisions of paragraph (55.7) and the "Contractor licensing" provisions of paragraph (55.8).

#### 55.6 Inspection Rights

Except as may be otherwise specified in this subcontract for specific items of proprietary data which are not subject to this paragraph, the Contractor's representatives, at all reasonable times up to three (3) years after final payment under this subcontract, may inspect at the Subcontractor's facility any proprietary data withheld under paragraph (55.5) and not furnished under paragraph (55.7) for the purposes of verifying that such data properly fell within the withholding provision of paragraph (55.5), or for evaluating work performance.

#### 55.7 Limited Rights in Proprietary Data

55.7.1 Except as may be otherwise specified in this subcontract as technical data which are not subject to this paragraph, the Subcontractor shall, upon written request from the Contractor at any time prior to three (3) years after final payment under this subcontract, promptly deliver to the Contractor and/or the Government any proprietary data withheld pursuant to paragraph (55.5) of the "Rights in Technical Data" clause of this subcontract. The following legend and no other is authorized to be affixed on any "proprietary data" delivered pursuant to this provision, provided the "proprietary data" meets the conditions for initial withholding under paragraph (55.5) of the "Rights in Technical Data" clause. The Government will thereafter treat the "proprietary data" in accordance with such legend.

##### LIMITED RIGHTS LEGEND

This "proprietary data," furnished under Subcontract No. \_\_\_\_\_ with the United States Department of Energy (and Purchase Order No. \_\_\_\_\_, if applicable) may be duplicated and used by the Government with the express limitations that the "proprietary data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

- (a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the proprietary data be retained in confidence and not be further disclosed;
- (b) This "proprietary data" may be disclosed to other contractors participating in the Government's program of which this subcontract is a part for information or use in connection with the work performed under their subcontracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or
- (c) This "proprietary data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed.
- (d) This legend shall be marked on any reproduction of this data in whole or in part.

#### 55.8 Contractor Licensing

Except as may be otherwise specified in this subcontract as technical data not subject to this paragraph, the Subcontractor agrees that upon written application by DOE, it will grant to the Government and responsible third parties, for purposes of practicing a subject of this subcontract, a non-exclusive license in any subcontract data which are proprietary data on terms and conditions reasonable under the circumstances including appropriate provisions for confidentiality; provided, however, the Subcontractor shall not be obligated to license any data if the Subcontractor demonstrates to the satisfaction of the Head of the Agency or his designee that:

- 55.8.1 Such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this subcontract.
- 55.8.2 Such data, in the form of results obtained by their use, have a commercially competitive alternative available or readily introducible from one or more other sources;
- 55.8.3 Such data, in the form of results obtained by their use, are being supplied by the Subcontractor or its licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the

Subcontractor or its licensees have taken effective steps or within a reasonable time are expected to take effective steps to so supply such data in the form or results obtained by its use; or

- 55.8.4 Such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the subcontract results.

## **56 RESERVED**

## **57 DISPUTES**

### **57.1 Definitions**

57.1.1 As used herein, "claim" means a written demand or written assertion by the subcontract parties seeking, as a matter of right, the payment of money, adjustment or interpretation of subcontract terms, or other relief arising under or relating to this subcontract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provide for the relief sought by the claimant. However, a written demand or assertion seeking the payment of money exceeding \$50,000 is not a valid claim until certified as noted in 57.3 below.

57.1.2 A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for the purposes of this clause. However, it may be converted to a claim by complying with the submission and certification requirements noted in this clause, if it is disputed as to liability or amount, or is not acted upon in a reasonable time by the Contractor.

57.2 Any claim or dispute arising out of or in connection with this subcontract, which is not disposed of by the agreement of the Contract Administrator and the Subcontractor, shall be termed a dispute and is subject to a final written decision by the Manager, Administrative Services. The claim shall include the following elements:

57.2.1 It must be made in writing and must be addressed to and request a final decision from the Manager, Administrative Services.

57.2.2 It must demand a specified sum of money.

57.2.3 It must contain adequate documentation to support the claim.

57.3 For all Subcontractor claims exceeding \$50,000, the Subcontractor shall submit with the claim a certification that:

57.3.1 The claim is made in good faith.

57.3.2 Supporting data are accurate and complete to the best of the Subcontractor's knowledge and belief.

57.3.3 The amount requested accurately reflects the subcontract adjustment for which the Subcontractor believes the Contractor is liable.

57.4 The Manager, Administrative Services's decision shall be final unless the Subcontractor files with the American Arbitration Association as noted in 57.6 below.

57.5 For Subcontractor claims of \$50,000 or less, the Manager, Administrative Services shall render a decision within 60 days of the request. For Subcontractor claims over \$50,000, the Manager, Administrative Services shall decide the claim within 60 days or notify the Subcontractor of the date by which a decision shall be made.

57.6 Within one year after issuance of a final decision by the Manager, Administrative Services, or upon the failure to issue such decision within a reasonable time, the claimant party may seek relief on its claim

by filing with the American Arbitration Association for binding arbitration. At the agreement of both parties, other Alternate Dispute Resolution (ADR) methods may also be pursued including facilitated negotiations, mediation, and non-binding arbitration. All proceedings will be performed in the state where work was performed unless another location is mutually agreed to. All decisions made in binding arbitration shall be final and not subject to review by any forum, tribunal, or Government agency.

- 57.7 The Contractor shall pay simple interest on the amount found due and unpaid from
- 57.7.1 The date the Manager, Administrative Services received the claim (properly certified if required), or
- 57.7.2 The date payment otherwise would be due, if that date is later, until the date of payment.
- 57.7.3 Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury pursuant to 31 U.S.C. Section 3901, et seq, which is applicable to the period during which the Manager, Administrative Services receives the claim, or the date payment otherwise would be due, and then at the rate applicable for each succeeding 6-month period as fixed by the Treasury Secretary during the pendency of the claim.
- 57.8 The Subcontractor shall proceed diligently with performance of this subcontract pending final resolution of any request for relief, claim, dispute, or action related to this subcontract and in accordance with the direction of the Contractor.

## **58 SECURITY REQUIREMENTS**

- 58.1 Subcontractor's duty to safeguard all classified information, special nuclear material, and other DOE property. The Subcontractor shall, in accordance with DOE security regulations and requirements, be responsible for safeguarding all classified information, and protection against sabotage, espionage, loss and theft, the classified documents and material in the Subcontractor's possession in connection with the performance of work under this subcontract. Except as otherwise expressly provided in this subcontract, the Subcontractor shall, upon completion or termination of this subcontract, transmit to the Contractor any classified matter in the possession of the Subcontractor or any person under the Subcontractor's control in connection with performance of this subcontract. If retention by the Subcontractor of any classified matter is required after the completion or termination of the subcontract and such retention is approved by the Contractor, the Subcontractor will complete a certificate of possession to be furnished to the Contractor specifying the classified matter to be retained. The certification shall identify the items and types or categories of matter retained, the conditions governing the retention of the matter, and the period of retention, if known. If the retention is approved by the Contractor, the security provisions of the subcontract will continue to be applicable to the matter retained. Special nuclear material will not be retained after the completion or termination of the subcontract.
- 58.2 Regulations. The Subcontractor agrees to conform to all security regulations and requirements of the Contractor and DOE.
- 58.3 Definitions as used in this clause 58:
- 58.3.1 The term "classified information" means Restricted Data, Formerly Restricted Data, or National Security Information.
- 58.3.2 The term "Restricted Data" means all data concerning
- 58.3.2.1 design, manufacture, or utilization of atomic weapons;
- 58.3.2.2 the production of special nuclear material; or
- 58.3.2.3 the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142d of the Atomic Energy Act of 1954, as amended.

- 58.3.3 The term “Formerly Restricted Data” means all data removed from the Restricted Data category under Section 142d of the Atomic Energy Act of 1954, as amended.
- 58.3.4 The term “National Security Information” means any information or material, regardless of its physical form or characteristics, that is owned or, produced for or by, or is under the control of the United States Government, that has been determined pursuant to Executive Order 12356 or prior Orders to require protection against unauthorized disclosure, and which is so designated.
- 58.3.5 “Special Nuclear Material” (SNM) means
- 58.3.5.1 plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, as amended, has been determined to be special nuclear material, but does not include source materials; or
  - 58.3.5.2 any material artificially enriched by any of the foregoing, but does not include source material.
- 58.4 Security clearance of personnel. The Contractor shall not permit any individual to have access to any classified information, except in accordance with the Atomic Energy Act of 1954, as amended, Executive Order 12356, and DOE’s regulations or requirements applicable to the particular level and category of classified information to which access is required.
- 58.5 Criminal liability. It is understood that disclosure of any classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to safeguard any classified information that may come to the Subcontractor or any person under the Subcontractor’s control in connection with work under this subcontract, may subject the Subcontractor, its agents, employees, or lower-tier subcontractors to criminal liability under the laws of the United States. (See the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2100 et seq; 18 U.S.C. 793 and 794; and Executive Order 12356).
- 58.6 Lower-tier subcontracts and purchase orders. Except as otherwise authorized in writing by the Contractor, the Subcontractor shall insert provisions similar to the foregoing in all lower-tier subcontracts and purchase orders under this subcontract.

## **59 LIABILITY FOR DAMAGES, PROTECTION OF EXISTING INSTALLATION**

- 59.1 The Subcontractor shall be responsible for all injury or death to persons or damage to property including livestock or underground utilities which are indicated in the specifications and/or drawings or the existence of which the Subcontractor knew or should have known, that occurs as a result of performing work hereunder. The Subcontractor, its Subcontractors, agents, servants, or employees shall indemnify and hold harmless the Contractor and the Government and their officers and employees from and against all claims or suits based upon any such injury or damage; and shall be responsible for all material delivered and work performed until completion and final acceptance of the work.
- 59.2 The Subcontractor shall preserve and protect all existing structures; including without limitation, building, out-buildings, fences, gates, tanks, cattle guards or other improvements, installations, roads or livestock water sources against damage or interruption of services. The Subcontractor shall repair or replace, at the option of the Contractor, without additional cost to the Contractor any damage done to said property prior to submitting a final invoice. The Subcontractor shall at all times preserve and protect any and all materials, supplies, and equipment of every description which is, or may become, Government property as described in this subcontract. All requests by the Contractor to enclose or especially protect such property shall be fully and promptly complied with by the Subcontractor.
- 59.3 The Subcontractor shall be responsible for removal, storage and protection of all personal property items, not removed by others, which are contained in the areas involved in remedial action. Unless other arrangements are specified in the subcontract documents, or specifically made with the property owner/tenant or Construction Inspector, the Subcontractor shall provide a lockable trailer to store all



such items. The Subcontractor shall make an inventory list of the Property Owner's personal property within the remedial action area stating the description, quantities, and general condition of any property that will be required to be removed from the remedial action area. The Subcontractor shall be responsible for the return of these items to their original locations at the completion of the remedial action, and all damaged or lost items shall be repaired or replaced at the expense of the Subcontractor. If removal of these items is not possible, the Subcontractor shall be responsible for protecting them from dust or damage which might occur during remedial action activities. This includes personal property items **adjacent** to the remedial action areas.

- 59.4 If the Contractor determines that structures, installations, materials, equipment, supplies, and work performed are not adequately protected by the Subcontractor, necessary protective action may be taken by the Contractor, and the cost thereof will be charged to the Subcontractor or be deducted from any payments due the Subcontractor. Unless otherwise stated in these terms and conditions or directed by the Contractor, damage to any utilities, the existence of which is not made known or not indicated in the specifications or drawings, shall be repaired immediately by the Subcontractor and payment will be made for such repair based on actual labor, materials, and overhead costs, without profit, and the time for performance will be extended to the extent that the entire subcontract work was delayed.
- 59.5 The Subcontractor, its subcontractors, agents, or employees shall indemnify and hold harmless the Contractor and the Government and their officers, directors, shareholders and employees from and against all claims or suits seeking the payment of fines or penalties for any failure to comply with any requirements of law applicable to the Subcontractor's work under this subcontract, or seeking to impose liability for damages to natural resources or for remedial action or other cleanup in connection with any releases of hazardous substances that may occur as a result of the Subcontractor's work under this subcontract. The obligations of the Subcontractor under this clause shall survive the termination of this subcontract and the completion of the work contemplated by this subcontract.

## **60 MATERIAL AND WORKMANSHIP**

- 60.1 Unless otherwise specifically provided in this subcontract, all equipment, material, and items incorporated in the work covered by this subcontract are to be new and of the most suitable grade for the purpose intended. Unless otherwise specifically provided in this subcontract, reference to any equipment, material, items, or patented process, by trademark, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Subcontractor may, at its option, use any equipment, material, items, or process which in the judgment of the Contractor, is equal to that named. The Subcontractor shall furnish to the Contractor for its approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature, and rating of the machinery and mechanical and other equipment, which the Subcontractor contemplates incorporating in the work. When required by this subcontract or when called for by the Contractor, the Subcontractor shall furnish the Contractor for approval full information concerning the material or items, which it contemplates incorporating in the work. When so directed, samples shall be submitted for approval at the Subcontractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and items installed or used without required approval shall be at the risk of subsequent rejection.
- 60.2 If the Subcontractor believes that furnishing used or reconditioned supplies or components will be in the Contractor's interest, the Subcontractor shall so notify the Contractor in writing. The Subcontractor's notice shall include the reasons for the request along with a proposal for any consideration to the Contractor if the Contractor authorizes the use of used or reconditioned supplies or components.
- 60.3 All work under this subcontract shall be performed in a skillful and workmanlike manner. The Contractor may require, in writing, that the Subcontractor remove from the work any employee the Contractor deems incompetent, careless, or otherwise objectionable.

## **61 RESERVED**

## **62 RESERVED**

## **63 SUSPENSION OF WORK**

- 63.1 The Contractor may order the Subcontractor, in writing, to suspend, delay, or interrupt all or any part of the work of this subcontract for the period of time that the Contractor determines it is in the best interest of the Government.
- 63.2 If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted
  - 63.2.1 by an act of the Contractor in the administration of this subcontract, or
  - 63.2.2 by the Contractor's failure to act within the time specified in this subcontract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the subcontract modified in writing accordingly. However, no adjustment shall be made under this clause for suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Subcontractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this subcontract.
- 63.3 A claim under this clause shall not be allowed
  - 63.3.1 for any costs incurred more than twenty (20) days before the Subcontractor shall have notified the Contractor in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and
  - 63.3.2 unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the subcontract.
  - 63.3.3 for any costs incurred due to OSHA noncompliance or other noncompliance with safety requirements of this subcontract.

## **64 WITHHOLDING OF FUNDS**

- 64.1 The Contractor may withhold or cause to be withheld from the Subcontractor so much of the accrued payments as may be considered necessary, either;
  - 64.1.1 to pay laborers and mechanics, including apprentices, trainees, watchmen, and guards, employed by the Subcontractor or any lower-tier subcontractor on the work, the full amount of wages required by the subcontract, and
  - 64.1.2 to satisfy any liability of the Subcontractor or any lower-tier subcontractor for liquidated damages under paragraph 68 of the clause entitled "Contract Work Hours and Safety Standard Act-Overtime Compensation."
- 64.2 If the Subcontractor or any lower-tier subcontractor fails to pay any laborer, mechanic, apprentice, trainee, watchman or guard, employed or working on the site of the work all or part of the wages required by the contract, the Contractor may, after written notice to the Subcontractor, take such action as may be necessary to cause suspension of any further payments or advances until such violations have ceased.

## **65 WORKMEN'S COMPENSATION**

The Subcontractor shall comply with all applicable Workmen's Compensation provisions of the state in which work is being performed under this subcontract, and shall furnish the Contractor with satisfactory evidence of the Subcontractor's coverage under such provisions. The Subcontractor further agrees to save harmless the Government, DOE, and the Contractor from all liability resulting from any injury of an occupational nature as described in any such applicable Workmen's Compensation provisions.

## **66 PROGRESS PAYMENTS TO SMALL BUSINESS CONCERNS**

(This clause is applicable only if progress payments are authorized under the "Payments" clause of the Subcontract Schedule.)

- 66.1 The Contractor will pay the subcontract price as hereinafter provided.
- 66.2 The Contractor will make progress payments monthly as the work proceeds, or at more frequent intervals, as the subcontract terms require. If requested by the Contractor, the Subcontractor shall furnish a breakdown of the total subcontract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contractor, at its discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Subcontractor at locations other than the site may also be taken into consideration
  - 66.2.1 if such consideration is specifically authorized by the subcontract and
  - 66.2.2 if the Subcontractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this subcontract.
- 66.3 In making such progress payments, there shall be retained five (5) percent of the subcontract amount at final payment until final completion and acceptance of the subcontract work. If the Contractor, at any time finds that satisfactory progress is being made, it may authorize payment in full for each progress payment for work performed to completion. Also, whenever the work is substantially complete, the Contractor shall retain an amount he considers adequate for protection of the Government and, at its discretion, may release to the Subcontractor all or a portion of any excess amount. Furthermore, on completion and acceptance of each separate building, property, public work, or other division of the subcontract, on which the price is stated separately in the subcontract, payment may be made therefore without retention of a percentage.
- 66.4 All material and work covered by progress payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Subcontractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the Contractor to require the fulfillment of all of the terms of the subcontract.
- 66.5 Upon completion and acceptance of all work, the amount due the Subcontractor under this subcontract shall be paid upon the presentation of a properly executed voucher and after the Subcontractor shall have furnished the Contractor with a release of all claims in stated amounts as may be specifically excepted by the Subcontractor from operation of the release. If the Subcontractor's claim to amounts payable under the subcontract has been assigned, a release may also be required of the assignee.
- 66.6 The Contractor may reduce or suspend progress payments, or liquidate them, or both, whenever he finds upon substantial evidence that the Subcontractor
  - 66.6.1 has failed to comply with any material requirement of this subcontract,
  - 66.6.2 is in such unsatisfactory financial condition, as to endanger performance of this subcontract,
  - 66.6.3 has allocated inventory to this subcontract substantially exceeding reasonable requirements,
  - 66.6.4 is delinquent in payment of the costs of performance of this subcontract in the ordinary course of business, or
  - 66.6.5 has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of this subcontract.

## **67 DAVIS-BACON ACT**

(Applicable to subcontracts in excess of \$2,000 (or in excess of \$10,000 in case of subparagraph 76.2 of the clause entitled "Apprentices and Trainees.")

- 67.1 All mechanics and laborers, including apprentices and trainees, employed or working directly upon the site of the work shall be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Regulations (29 CFR Part 3)), the full amounts due at time of payment computed at wage rates not less than the aggregate of the basic hourly rates and the rates of payments, contributions, or costs for any fringe benefits contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any subcontractual relationship which may be alleged to exist between the Subcontractor or lower-tier subcontractor and such laborers and mechanics. A copy of such wage determination decision shall be kept posted by the Subcontractor at the site of the work in a prominent place where it can be easily seen by the workers.
- 67.2 The Subcontractor may discharge its obligation under this clause to workers in any classification for which the wage determination decision contains:
- 67.2.1 Only a basic hourly rate of pay, by making payment at not less than such basic hourly rate, except as otherwise provided in the Copeland Regulations (29 CFR Part 3); or
- 67.2.2 Both a basic hourly rate of pay and fringe benefits payments, by making payment in cash, by irrevocably making contributions pursuant to a fund, plan, or program for, and/or by assuming an enforceable commitment to bear the cost of, bona fide fringe benefits contemplated by the Davis-Bacon Act, or by any combination thereof. Contributions made, or costs assumed, on other than a weekly basis shall be considered as having been constructively made or assumed during a weekly period to the extent that they apply to such period. Where fringe benefit is expressed in a wage determination in any manner other than as an hourly rate different from any contained in the wage determination, it shall similarly show how it arrived at the hourly rate shown therefore. In the event of disagreement between or among the interested parties as to an equivalent of any fringe benefit, DOE shall submit the question, together with its recommendation, to the Secretary of Labor for final determination.

## **68 CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME COMPENSATION**

This subcontract, to the extent that it is of a character specified in the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), is subject to the following provisions and to all other applicable provisions and exceptions of such Act and the regulation of the Secretary of Labor hereunder.

- 68.1 No Subcontractor contracting for any part of the subcontract work which may require or involve the employment of laborers, mechanics, apprentices, trainees, watchmen, or guards shall require or permit any laborer, mechanic, apprentice, trainee, watchman, or guard, in any work week in which he/she is employed on such work, to work in excess of 40 hours in such work week or work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer, mechanic, apprentice, trainee, watchman, or guard receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked excess of 40 hours such work week.
- 68.1.1 The Contractor observes the following official holidays:
- New Year's Day
  - Martin L. King's Birthday
  - President's Day
  - Memorial Day
  - Independence Day
  - Labor Day

Veterans' Day

Thanksgiving

The day after Thanksgiving

Christmas Day

68.1.2 If the Subcontractor intends to work on any of the holidays listed in paragraph 68.1.1, he must notify the Contractor in writing not less than seven (7) days prior to the holiday.

68.1.3 Unless otherwise directed or mutually agreed to, the normal working hours shall be 8:00 a.m. to 4:30 p.m., Monday through Friday, however, see paragraph 68.1.1 above.

68.2 In the event of any violation of the provisions of paragraph 68.1, the Subcontractor and any lower-tier subcontractor responsible therefore shall be liable to any affected employee for his unpaid wages. In addition, such Subcontractor and lower-tier subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer, mechanic, apprentice, trainee, watchman, or guard employed in violation of the provisions of paragraph 68.1 in the sum of \$10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of his standard work week of 40 hours without payment of the overtime wages required by paragraph 68.1.

68.3 The Contractor may withhold from the Subcontractor, from any monies payable on account of work performed by the Subcontractor or lower-tier subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such Subcontractor or lower-tier subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph 68.1.3.

68.4 The Subcontractor shall insert paragraphs 68.2 through 68.4 of this clause in all subcontracts, and shall require their inclusion in all subcontracts of any tier.

## **69 PAYROLLS AND BASIC RECORDS**

69.1 The Subcontractor shall maintain payrolls and basic records relating thereto during the course of the work and shall preserve them for a period of three years thereafter for all laborers and mechanics, including apprentices, trainees, watchmen, and guards, working at the site of the work. Such records shall contain the name and address of each such employee, his correct classification, rate of pay (including rates of contributing for, or costs assumed to provide, fringe benefits), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Subcontractor has obtained approval from the Secretary of Labor as provided in paragraph 67.1 of the clause entitled "Davis-Bacon Act," it shall maintain records which show the commitment, its approval, written communication of the plan or program to the laborers or mechanics affected and the costs anticipated or incurred under the plan or program.

69.2 The Subcontractor shall submit weekly a copy of all payrolls to the Contractor. The Subcontractor shall be responsible for the submission of copies of payrolls of all lower-tier subcontractors. The copy shall be accompanied by a statement signed by the Subcontractor indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor, and that the classifications set forth for each laborer or mechanic, including apprentices and trainees, conform with the work it performed. The Subcontractor shall submit also a copy of any approval by the Secretary of Labor with respect to fringe benefits which is required by paragraph 67.1 of the clause entitled "Davis-Bacon Act." Subcontractors employing apprentices or trainees under approved programs shall include a notation on the first weekly-certified payrolls, submitted to the Contractor that their employment is pursuant to an approved program and shall identify the program.

69.2.1 The weekly submission of a properly executed certification set forth on the reverse side of Option Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance."

69.2.2 The falsification of any of the above certifications may subject the Contractor or Subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code.

69.2.3 The Subcontractor shall make the records required under this clause available for inspection, copying, or transcription by the Contractor, or the Department of Labor, or their duly authorized representatives. The Subcontractor's failure to submit the required records or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

## **70 COMPLIANCE WITH COPELAND REGULATIONS**

The Subcontractor shall comply with the Copeland Regulations of the Secretary of Labor (29 CFR Part 3), which are incorporated herein by reference.

## **71 SUBCONTRACTOR LABOR CLAUSES**

The Subcontractor shall insert in any subcontract, the clauses 64, 65, 67, 68, 69, 70, 72, 73, 74, 75, and 76 and such other clauses as the Contractor may by appropriate instructions require, and also insert a clause requiring the lower-tier subcontractors to include these clauses in any lower-tier subcontracts.

## **72 CONTRACT TERMINATION: DEBARMENT**

A breach of clause 71 above may be grounds for termination of the subcontract, and for debarment as a Subcontractor as set forth in 29 CFR 5.12.

## **73 DISPUTES CONCERNING LABOR STANDARDS**

Disputes arising out of the labor standards provisions of this subcontract shall not be subject to the general dispute clause of this subcontract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors and any lower-tier subcontractor) and the contracting agency, the U. S. Department of Labor, or the employees or their representatives.

## **74 COMPLIANCE WITH DAVIS-BACON AND RELATED ACT REQUIREMENTS**

All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this subcontract.

## **75 CERTIFICATION OF ELIGIBILITY**

75.1 By entering into this subcontract, the Subcontractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the Subcontractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

75.2 No part of this subcontract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

75.3 The penalty for making false statements is prescribed in the U. S. Criminal Code, 18 U.S.C. 1001.

## **76 APPRENTICES AND TRAINEES**

76.1 Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employees pursuant to an individually registered in a bona fide apprenticeship program registered with the U. S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and training or a State Apprenticeship Agency (here appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Contractor as to the entire work force under the registered

program. Any worker listed on a payroll at an apprentice wage rate, which is not registered or otherwise employed as stated above shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a Contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Contractor's or Subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level or progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the Contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

- 76.2 Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U. S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administration of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate that is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination of the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
- 76.3 Equal employment opportunity. The utilization of apprentices, trainees, and journeymen shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.
- 76.4 If at any time the Bureau of Apprenticeship and Training determines, after opportunity for a hearing, that the standards of a training program have not been complied with, or that such a program fails to provide adequate training for participants, the Subcontractor shall not utilize trainees at less than the redetermined rate for the classification of work actually performed until an acceptable program is approved. If the Subcontractor brings an appeal pursuant to 29 CFR 5.17 within thirty (30) days of its receipt of a certified letter withdrawing the Bureau of Apprenticeship and Training approval, the effect of the withdrawal of approval of the program will be delayed until a decision is rendered on the appeal pursuant to 29 CFR 5.17.

## **77 CLEANING UP**

- 77.1 The Subcontractor shall at all times keep the work site, including storage areas used by him, free from accumulations of waste material or rubbish and prior to completion of work remove any rubbish from the premises and all tools, scaffolding, equipment, and materials not the property of the Government.
- 77.2 At the time of termination of construction or of any extended suspension of construction, or at completion but before final acceptance by the Contractor, the Subcontractor, at his own expense, shall remove from the Owner's property and from all public and private property, all of his equipment and such unused materials that the Contractor has made no payment for, shall remove all temporary structures, rubbish, waste materials, dirt and debris resulting from his remedial action operations, and shall leave the project site equal to or better than preconstruction order and cleanliness. In the event the Subcontractor fails to do so, the Contractor may remove and store such equipment and unused materials and may dispose of rubbish and waste at the expense of the Subcontractor. The cost of such removal, storage and disposal may be deducted from any payment due the Subcontractor.

## **78 SUBCONTRACTOR COST OR PRICING DATA - MODIFICATIONS**

- 78.1 The requirements of paragraphs 78.2 and 78.3 of this clause shall become operative only for any modifications to this subcontract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed \$500,000 and to be limited to such modifications.
- 78.2 Before awarding any subcontract expected to exceed \$500,000 when entered into, or pricing any subcontract modification involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed \$500,000, the Subcontractor shall submit to the Contractor cost or pricing data (actually or by specific identification in writing), unless the price is
- 78.2.1 based on adequate price competition;
- 78.2.2 based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
- 78.2.3 set by law or regulation.
- 78.3 The Subcontractor shall certify in substantially the form prescribed by the Contractor that, to the best of its knowledge and belief, the data submitted under paragraph 78.2 above were accurate, complete, and current as to the date of agreement on the negotiated price of the subcontract modification.
- 78.4 The Subcontractor shall insert the substance of this clause, including this paragraph, in each lower-tier subcontract that exceeds \$500,000 when entered into.

## **79 SUBCONTRACTOR COST OR PRICING DATA**

- 79.1 If this subcontract is expected to exceed \$500,000 when entered into, or before pricing any subcontract modification involving a pricing adjustment expected to exceed \$500,000, the Subcontractor shall submit cost or pricing data (actually or by specific identification in writing), unless the price is
- 79.1.1 based on adequate price competition;
- 79.1.2 based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
- 79.1.3 set by law or regulation.
- 79.2 The Subcontractor shall certify, in substantially the form prescribed in Subsection 15.804-4 of the Federal Acquisition Regulation (FAR), that, to the best of its knowledge and belief, the data submitted under paragraph (79.1) above were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.



- 79.3 In each lower-tier subcontract that exceeds \$500,000 when entered into, the Subcontractor shall insert the substance of this clause, including this paragraph (79.3), if paragraph (79.1) above requires submission of cost or pricing data for the subcontract.

## **80 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA**

- 80.1 If any price, including profit or fee, negotiated in connection with this subcontract, or any cost reimbursable under this subcontract, was increased by any significant amount because
- 80.1.1 the Subcontractor or a lower-tier subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data,
  - 80.1.2 a lower-tier subcontractor or prospective subcontractor furnished the Subcontractor cost or pricing data that were not complete, accurate, and current as certified in the Subcontractor's Certificate of Current Cost or Pricing Data, or
  - 80.1.3 any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.
- 80.2 Any reduction in the contract price under paragraph (80.1) above due to defective data from a prospective lower-tier subcontractor that was not subsequently awarded the lower-tier subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which the actual lower-tier subcontract or the actual cost to the Subcontractor, if there was no lower-tier subcontract, was less than the prospective subcontract cost estimate submitted by the Subcontractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.

## **81 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS**

- 81.1 This clause shall become operative only for any modification to this subcontract involving a pricing adjustment expected to exceed \$500,000, except that this clause does not apply to any modification for which price is
- 81.1.1 based on adequate price competition;
  - 81.1.2 based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
  - 81.1.3 set by law or regulation.
- The price or cost shall be reduced accordingly and the subcontract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph 81.1.
- 81.2 If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this subcontract, was increased by any significant amount because
- 81.2.1 the Subcontractor or a lower-tier subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data,
  - 81.2.2 a subcontractor or prospective lower-tier subcontractor furnished the Subcontractor cost or pricing data that were not complete, accurate, and current as certified in the Subcontractor's Certificate of Current Cost or Pricing Data, or
  - 81.2.3 any of these parties furnished data of any description that were not accurate.
- 81.3 Any reduction in the subcontract price under paragraph (81.2) above due to defective data from a prospective lower-tier subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which the actual subcontract or the actual cost to the Contractor if there was no lower-tier subcontract, was less than the prospective

subcontract cost estimate submitted by the Subcontractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.

## **82 AUDIT-NEGOTIATION (OVER \$10,000)**

### **82.1 Examination of Costs**

If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of these, the Subcontractor shall maintain-and the Contractor or representatives of the Contractor shall have the right to examine and audit-books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred in performing this subcontract. This right of examination shall include inspection at all reasonable times of the Subcontractor's plants, or parts of them, engaged in performing the subcontract.

### **82.2 Cost or Pricing Data**

If, pursuant to law, the Subcontractor has been required to submit cost or pricing data in connection with pricing this subcontract or any modification to this subcontract, the Contractor or representatives of the Contractor shall have the right to examine and audit all books, records, documents, and other data of the Subcontractor (including computations and projections) related to negotiating, pricing, or performing the subcontract or modification, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data. The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used.

### **82.3 Reports**

If the Subcontractor is required to furnish cost, funding, or performance reports, the Subcontractor or representatives of the Contractor who are employees of the Contractor shall have the right to examine and audit books, records, other documents, and supporting materials, for the purpose of evaluating

82.3.1 the effectiveness of the Subcontractor's policies and procedures to produce data compatible with the objectives of these reports and

82.3.2 the data reported.

### **82.4 Availability**

The Subcontractor shall make available at its office at all reasonable times the materials described in paragraphs (a) and (b) above, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any shorter period, or for any longer period required by applicable statute or by other clauses of this contract. In addition,

82.4.1 If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement; and

82.4.2 Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are disposed of.

82.5 The Subcontractor shall insert a clause containing all the terms of this clause, including this paragraph (82.5), in all subcontracts over \$10,000 under this subcontract, altering the clause only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

### **83 LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS**

(Applicable to Subcontract awards in excess of \$100,000.)

#### **83.1 Definitions.**

83.1.1 “Agency,” as used in this clause, means executive agency.

83.1.2 “Covered Federal action,” as used in this clause, means any of the following Federal actions:

83.1.2.1 The awarding of any Federal contract.

83.1.2.2 The making of any Federal grant.

83.1.2.3 The making of any Federal loan.

83.1.2.4 The entering into of any cooperative agreement.

83.1.2.5 The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

83.1.3 “Indian tribe” and “tribal organization,” as used in this clause, have the meaning provided in Section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B) and include Alaskan Natives.

83.1.4 “Influencing or attempting to influence,” as used in this clause, means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, or an employee of a Member of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

83.1.5 “Local government,” as used in this clause, means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

83.1.6 “Officer or employee of an agency,” as used in this clause, includes the following individuals who are employed by an agency:

83.1.6.1 An individual who is appointed to a position in the Government under Title 5, United States Code, including a position under a temporary appointment.

83.1.6.2 A member of the uniformed services, as defined in Subsection 101(3), Title 37, United States Code.

83.1.6.3 A special Government employee, as defined in Section 202, Title 18, United States Code.

83.1.6.4 An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, United States Code, Appendix 2.

83.1.7 “Person,” as used in this clause, means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit, or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

83.1.8 “Reasonable compensation,” as used in this clause, means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

- 83.1.9 “Reasonable payment,” as used in this clause, means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.
- 83.1.10 “Recipient,” as used in this clause, includes the Contractor and all subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.
- 83.1.11 “Regularly employed,” as used in this clause, means, with respect to an officer or employee of a person requesting or receiving a Federal contract, an officer or employee who is employed by such person for at least 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.
- 83.1.12 “State,” as used in this clause, means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and multi-State, regional, or interstate entity having governmental duties and powers.

83.2 Prohibitions.

- 83.2.1 Section 1352 of Title 31, United States Code, among other things, prohibits a recipient of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions; the awarding of any Federal contract; the making of any Federal loan; the entering into of any cooperative agreement; or the modification of any Federal contract, grant, loan, or cooperative agreement.
- 83.2.2 The Act also requires Subcontractors to furnish a disclosure if any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a Federal contract, grant, loan, or cooperative agreement.
- 83.2.3 The prohibitions of the Act do not apply under the following conditions:
- 83.2.3.1 Agency and legislative liaison by own employees.
- 83.2.3.1.1 The prohibition on the use of appropriated funds, in subparagraph 83.2.1 of this clause, does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.
- 83.2.3.1.2 For purposes of subdivision 83.2.3.1.1 of this clause, providing any information specifically requested by an agency or Congress is permitted at any time.
- 83.2.3.1.3 The following agency and legislative liaison activities are permitted at any time where they are not related to a specific solicitation for any covered Federal action:
- 83.2.3.1.3.1 Discussing with an agency the qualities and characteristics (including individual demonstrations) of the person’s products or services, conditions or terms of sale, and service capabilities.

- 83.2.3.1.3.2 Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.
- 83.2.3.1.4 The following agency and legislative liaison activities are permitted where they are prior to formal solicitation of any covered Federal action—
  - 83.2.3.1.4.1 Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;
  - 83.2.3.1.4.2 Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and
  - 83.2.3.1.4.3 Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507, and subsequent amendments.
- 83.2.3.1.5 Only those services expressly authorized by subdivision 83.2.3.1.1 of this clause are permitted under this clause.
- 83.2.3.2 Professional and technical services.
  - 83.2.3.2.1 The prohibition on the use of appropriated funds, in subparagraph 83.2.1 of this clause, does not apply in the case of—
    - 83.2.3.2.1.1 A payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action, if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action.
    - 83.2.3.2.1.2 Any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.
  - 83.2.3.2.2 For purposes of subdivision 83.2.3.2.1 of this clause, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable.  
  
Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment

rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

83.2.3.2.3 Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation and any other requirements in the actual award documents.

83.2.3.2.4 Only those services expressly authorized by subdivisions 83.2.3.2.1.1 and 83.2.3.2.1.2 of this clause are permitted under this clause.

83.2.3.2.5 The reporting requirements of FAR 3.803(a) shall not apply with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

#### 83.2.3.3 Disclosure.

83.2.3.3.1 The Subcontractor who requests or receives from an agency a Federal contract shall file with that agency a disclosure form, OMB standard form LLL, Disclosure of Lobbying Activities, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under subparagraph 83.2.1 of this clause, if paid for with appropriated funds.

83.2.3.3.2 The Subcontractor shall file a disclosure form at the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under subparagraph 83.2.3.3.3 of this clause. An event that materially affects the accuracy of the information reported includes—

83.2.3.3.2.1 A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

83.2.3.3.2.2 A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or

83.2.3.3.2.3 A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

- 83.2.3.3.3 The Subcontractor shall require the submittal of a certification, and if required, a disclosure form by any person who requests or received any subcontract exceeding \$100,000 under the Federal contract.
- 83.2.3.3.4 All lower tier subcontractor disclosure forms (but not certifications) shall be forwarded from tier to tier until received by the Subcontractor. The Subcontractor shall submit all disclosures to the Contractor at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor. Each lower tier subcontractor certification shall be retained in the subcontract file of the awarding Subcontractor.
- 83.2.3.4 Agreement. The Subcontractor agrees not to make any payment prohibited by this clause.
- 83.2.3.5 Penalties.
  - 83.2.3.5.1 Any person who makes an expenditure prohibited under paragraph 83.1 of this clause or who fails to file or amend the disclosure form to be filed or amended by paragraph 83.2 of this clause shall be subject to civil penalties as provided for by 31 U.S.C. 1352. An imposition of a civil penalty does not prevent the Government from seeking any other remedy that may be applicable.
  - 83.2.3.5.2 Subcontractors may rely without liability on the representation made by their subcontractors in the certification and disclosure form.
- 83.2.3.6 Cost allowability. Nothing in this clause makes allowable or reasonable any costs, which would otherwise be unallowable or unreasonable. Conversely, costs made specifically unallowable by the requirements in this clause will not be made allowable under any other provision.

#### **84 PATENT INDEMNITY**

- 84.1 If the amount of this subcontract is in excess of \$10,000 the Subcontractor shall indemnify the Contractor, the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States letters patent (except U. S. letters patent issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government) arising out of
  - 84.1.1 the manufacture or delivery of supplies, or
  - 84.1.2 out of construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this subcontract, or
  - 84.1.3 out of the use or disposal by or for the account of the Government of such supplies or construction work.
- 84.2 The foregoing indemnity shall not apply unless the Subcontractor
  - 84.2.1 shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and
  - 84.2.2 shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof; and further,
  - 84.2.3 such indemnity shall not apply to
    - 84.2.3.1 an infringement resulting from compliance with specific written instructions for the Contractor directing a change in the supplies to be delivered or in the materials or

equipment to be used, or directing a manner of performance of the subcontract not normally used by the Subcontractor, or

84.2.3.2 an infringement resulting from addition to or change in, such supplies or components furnished or construction work performed which addition or change was made subsequent to delivery or performance by the Subcontractor, or

84.2.3.3 a claimed infringement which is settled without the consent of the Subcontractor, unless required by final decree of a court of competent jurisdiction.

## **85 PREFERENCE FOR U. S.-FLAG AIR CARRIERS**

This clause does not apply to small purchases as defined in FAR Part 13.

### **85.1 Definitions**

85.1.1 "International air transportation," as used in this clause, means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

85.1.2 "United States," as used in this clause, means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and possessions of the United States.

85.1.3 "U. S.-flag air carrier," as used in this clause, means an air carrier holding a certificate under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. 1371).

85.2 Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 1517)(Fly America Act) requires that all Federal agencies and Government contractors and subcontractors use U. S.-flag air carriers for U. S. Government-financed international air transportation of personnel (and their personal effects) or property, to the extent that service by those carriers is available. It requires the Comptroller General of the United States, in the absence of satisfactory proof of the necessity for foreign-flag air transportation, to disallow expenditures from funds, appropriated or otherwise established for the account of the United States, for international air transportation secured aboard a foreign-flag air carrier if a U. S.-flag air carrier is available to provide such services.

85.3 The Subcontractor agrees, in performing work under this subcontract, to use U. S.-flag air carriers for international air transportation of personnel (and their personal effects) or property to the extent that service by those carriers is available.

85.4 In the event that the Subcontractor selects a carrier other than a U. S.-flag air carrier for international air transportation, the Subcontractor shall include a certification on vouchers involving such transportation essentially as follows:

#### **CERTIFICATION OF UNAVAILABILITY OF U. S.-FLAG AIR CARRIERS**

I hereby certify that international air transportation of persons (and their personal effects or property by U. S.-flag air carrier was not available or it was necessary to use foreign-flag air carrier service for the following reasons (see Section 47.403 of the Federal Acquisition Regulation): (State reasons):.....

(End of certification)

85.5 The Subcontractor shall include the substance of this clause, including this paragraph (85.5), in each lower-tier subcontract or purchase under this subcontract that may involve international air transportation.

## **86 PREFERENCE FOR PRIVATELY OWNED U. S.-FLAG COMMERCIAL VESSELS**

86.1 The Cargo Preference Act of 1954 (46 U.S.C. 1241(b)) requires that Federal departments and agencies shall transport in privately owned U. S.-flag commercial vessels at least 50 percent of the gross tonnage



of equipment, materials, or commodities that may be transported in ocean vessels (computed separately for dry bulk carriers, dry cargo liners, and tankers). Such transportation shall be accomplished when any equipment, materials, or commodities, located within or outside the United States, that may be transported by ocean vessel are

86.1.1 acquired for a U. S. Government agency account;

86.1.2 furnished to, or for the account of, any foreign nation without provision for reimbursement;

86.1.3 furnished for the account of a foreign nation in connection with which the United States advances funds or credits, or guarantees the convertibility of foreign currencies; or

86.1.4 acquired with advance of funds, loans, or guaranties made by or on behalf of the United States.

86.2 The Subcontractor shall use privately owned U. S.-flag commercial vessels to ship at least 50 percent of the gross tonnage involved under this contract (computed separately for dry bulk carriers, dry cargo liners, and tankers) whenever shipping any equipment, materials, or commodities under the conditions set forth in paragraph (86.1) above, to the extent that such vessels are available at rates that are fair and reasonable for privately owned U. S.-flag commercial vessels.

86.3 Bill of Lading

86.3.1 The Subcontractor shall submit one legible copy of a rated on-board ocean bill of lading for each shipment to both

86.3.1.1 the Contracting Officer and

86.3.1.2 the Division of National Cargo, Office of Market Development, Maritime Administration, U. S. Department of Transportation, Washington, DC 20590.

Subcontractor bills of lading shall be submitted through the Prime Contractor.

86.3.2 The Subcontractor shall furnish these bill of lading copies

86.3.2.1 within 20 working days of the date of loading for shipments originating in the United States or

86.3.2.2 within 30 working days for shipments originating outside the United States.

86.3.3 Each bill of lading copy shall contain the following information:

86.3.3.1 Sponsoring U. S. Government agency

86.3.3.2 Name of vessel

86.3.3.3 Vessel flag or registry

86.3.3.4 Date of loading

86.3.3.5 Port of loading

86.3.3.6 Port of final discharge

86.3.3.7 Description of commodity

86.3.3.8 Gross weight in pounds and cubic feet if available

86.3.3.9 Total ocean freight revenue in U. S. dollars

86.4 Except for small purchases as described in 48 CFR 13, the Subcontractor shall insert the substance of this clause, including this paragraph (86.4), in all lower-tier subcontracts or purchase orders under this subcontract.

- 86.5 The requirement in paragraph (86.1) does not apply to
- 86.5.1 small purchases as defined in 48 CFR 13;
  - 86.5.2 cargoes carried in vessels of the Panama Canal Commission or as required or authorized by law or treaty;
  - 86.5.3 ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353); and
  - 86.5.4 shipments of classified supplies when the classification prohibits the use of non-Government vessels.
- 86.6 Guidance regarding fair and reasonable rates for privately owned U. S.-flag commercial vessels may be obtained from the Division of National Cargo, Office of Market Development, Maritime Administration, U. S. Department of Transportation, Washington, DC 20590, Phone: 202-426-4610.

## **87 ACQUISITION OF REAL PROPERTY**

- 87.1 Notwithstanding any other provision of the subcontract, the prior approval of the Contractor shall be obtained when, in performance of this subcontract, the Subcontractor acquires or proposes to acquire use of real property by:
- 87.1.1 Purchase, on the Government's behalf or in the Contractor's own name, with title eventually vesting in the Government.
  - 87.1.2 Lease, and the Government assumes liability for, or will otherwise pay for the obligation under the lease as a reimbursable subcontract cost.
  - 87.1.3 Acquisition of temporary interest through easement, license or permit, and the Government funds the entire cost of the temporary interest.
- 87.2 Justification of and execution of any real property acquisitions shall be in accordance and compliance with directions provided by the Contractor.
- 87.3 The substance of this clause, including this paragraph (87.3), shall be included in any lower-tier subcontract occasioned by this subcontract under which property described in paragraph (87.1) of this clause shall be acquired.

## **88 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES**

Unless advance written approval of the Contract Administrator is obtained, the Subcontract shall not acquire, for use in the performance of this subcontract, any supplies or services originating from sources within, or that were located in or transported through, countries whose products are banned from importation in the U.S. under regulations of the Office of Foreign Assets Control, Department of the Treasury. Those countries include Cuba, Iran, Iraq, Libya, and North Korea.

The Subcontractor shall not acquire for use in the performance of this subcontract any supplies or services from entities controlled by the Government of Iraq.

The Subcontractor agrees to comply with any "Sensitive Foreign Nations Controls" that may be identified in writing to the Subcontractor. The Subcontractor shall have the right to terminate its performance upon 60 days notice if it is unable to perform without substantially interfering with its policies.

The Subcontractor agrees to include this clause in all lower tier subcontracts.

## **89 SUBSTANCE ABUSE PROGRAM**

(Applicable for all subcontracts and lower tier subcontracts with a value of \$25,000 or more involving performance of work at a DOE or STOLLER controlled site.)

#### 89.1 PROGRAM IMPLEMENTATION

The Subcontractor shall, consistent with 10 CFR Part 707, Workplace Substance Abuse Programs at DOE Sites, incorporated herein by reference with full force and effect, develop, implement, and maintain a workplace substance abuse program. This program shall be submitted to the Contract Administrator within 10 days of receipt of the Notice of Award for review and acceptance by STOLLER.

#### 89.2 REMEDIES

The Subcontractor's failure to comply with this clause will be considered breach of contract and result in disciplinary action up to and including termination for default. Any costs related to suspensions of work or other disciplinary action due to failures to comply with this procedure will be the responsibility of the Subcontractor.

#### 89.3 LOWER TIER SUBCONTRACTS

89.3.1 The Subcontractor agrees to notify the Contract Administrator reasonably in advance of, but no later than 10 days prior to, award of any lower tier subcontract the Subcontractor feels may be subject to the requirements of 10 CFR Part 707.

89.3.2 The Subcontractor shall require all lower tier subcontractors subject to the provisions of 10 CFR Part 707 to agree to develop and implement a workplace substance abuse program as a condition of award. The Subcontractor shall review and approve the programs and periodically monitor compliance with 10 CFR Part 707. After approval, the Subcontractor shall forward a copy of the program to the Contractor.

#### 89.4 PROGRAM ELEMENTS

89.4.1 Subcontractors shall use their best efforts to assure that all workers assigned to this subcontract are free from substance abuse. The Subcontractor shall develop a written program consistent with 10 CFR Part 707 and guidelines of the Department of Health and Human Services.

89.4.2 The Subcontractor's program shall include at least the following elements:

89.4.2.1 Prohibition of the use, possession, sale, or manufacture of illegal drugs or alcohol and from the misuse or abuse of alcohol at Contractor controlled sites.

89.4.2.2 Plans for instruction of supervisors and employees concerning problems of substance abuse, including illegal drug use and alcohol abuse, the availability of employee assistance, and the penalties that may be imposed upon employees for drug and alcohol related violations.

89.4.2.3 Provision for distribution of this policy to all employees engaged in this subcontract. The Subcontractor shall maintain documentation of this policy distribution. The policy shall include a statement that as a condition of employment under this subcontract the employee will:

89.4.2.3.1 Abide by the terms of the policy.

89.4.2.3.2 Notify the Subcontractor in writing of the employee's conviction under a criminal drug statute or alcohol conviction for a violation occurring on the Contractor controlled site within 10 calendar days of conviction.

89.4.3 Provision for written notification to the Contract Administrator of any employee's conviction within 10 calendar days of receiving such notice.

89.4.4 Provision for taking appropriate personnel action for violations of this policy within thirty (30) calendar days of notice of violation as follows:

89.4.4.1 Termination of employment; or

89.4.4.2 Offer the employee the opportunity to participate in a substance abuse assistance or rehabilitation program approved by an appropriate Federal, State, or local agency.

89.4.5 Commitment to make a good faith effort to maintain a workplace free of substance abuse.

#### 89.5 TESTING DESIGNATED POSITIONS

If the Subcontractor has identified "testing designated positions" as defined in 10 CFR 707.7B, all testing requirements of 10 CFR 707 shall be met including notification requirements, pre-employment urine drug analysis, random urine drug analysis, and urine drug analysis for reasonable suspicion. The Subcontractor shall notify the Contract Administrator of any identified "designated positions" for drug testing prior to performance of work. The Subcontractor shall also notify the Contract Administrator in writing of any positive drug tests, drug related arrests, or conviction of an employee in a "testing designated position" within 10 calendar days. The Subcontractor shall take appropriate disciplinary action for each occurrence. Individuals in "testing designated positions" who are not free from the use of illegal drugs shall be prohibited from working in those positions.

### 90 WHISTLEBLOWER PROTECTION FOR SUBCONTRACTOR EMPLOYEES (DEC 1992) (DEAR 970.5204-59)

90.1 The subcontractor shall comply with the requirements of the "DOE Contractor Employee Protection Program" at 10 CFR Part 708 with respect to work performed on-site at a DOE-owned or leased facility as provided for at 10 CFR Part 708.

90.2 The subcontractor shall insert or have inserted the substance of this clause, including this paragraph (90.2), in subcontracts, at all tiers, with respect to work performed on-site at a DOE-owned or -leased facility, as provided for a 10 CFR Part 708.

### 91 LIMITATION OF LIABILITY SERVICES (OVER \$25,000)

91.1 Except as provided in paragraphs (91.2) and (91.3) below, and except to the extent that the Subcontractor is expressly responsible under this subcontract for deficiencies in the services required to be performed under it (including any materials furnished in conjunction with those services), the Subcontractor shall not be liable for loss of or damage to property of the Contractor that—

91.1.1 occurs after Contractor acceptance of services performed under this subcontract and

91.1.2 results from any defects or deficiencies in the services performed or materials furnished.

91.2 The limitation of liability under paragraph (91.1) above shall not apply when a defect or deficiency in, or the Contractor's acceptance of, services performed or materials furnished results from willful misconduct or lack of good faith on the part of any of the Subcontractor's managerial personnel. The term "Subcontractor's managerial personnel", as used in this clause, means the Subcontractor's directors, officers, and any of the Subcontractor's managers, superintendents, or equivalent representatives who have supervision or direction of -

91.2.1 All or substantially all of the Subcontractor's business;

91.2.2 All or substantially all of the Subcontractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

91.2.3 A separate and complete major industrial operation connected with the performance of this contract.

91.3 If the Subcontractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Contractor through the Subcontractor's performance of services or furnishing of materials under this contract, the Subcontractor shall be liable to the Contractor, to the extent of such insurance or reserve, for loss of or damage to property of the Contractor occurring after

Contractor acceptance of, and resulting from any defects and deficiencies in, services performed or materials furnished under this subcontract.

- 91.4 The Contractor shall include this clause, including this paragraph (91.4), supplemented as necessary to reflect the relationship of the contracting parties, in all subcontracts over \$25,000.

## **92 PATENT RIGHTS - LONG FORM**

(This clause shall apply only when specifically required by subcontract.)

### **92.1 Definitions**

- 92.1.1 “Subject Invention” means any invention or discovery of the Participant conceived or first actually reduced to practice in the course of or under this Agreement, and includes any art, method, process, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plants, whether patented or unpatented under the Patent Laws of the United States of America or any foreign country.
- 92.1.2 “Contract” means any contract or subcontract of any tier, grant, agreement, understanding or other arrangement, which includes research, development, or demonstration work, and includes any assignment or substitution of parties.
- 92.1.3 “States and domestic municipal governments” means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, and any political subdivision and agencies thereof.
- 92.1.4 “Government agency” includes any executive department, independent commission, board, office, agency, administration, authority, Government Corporation, or other Government establishment of the Executive Branch of the Government of the United States of America.
- 92.1.5 “To the point of practical application” means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine and under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public.
- 92.1.6 “Patent Counsel” means the DOE Patent Counsel assisting the procuring activity.

### **92.2 Allocation of Principal Rights**

- 92.2.1 Assignment to the Government. The Subcontractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each Subject Invention except to the extent that rights are retained by the Subcontractor under subparagraph 92.2.2 and paragraph 92.3 of this clause.
- 92.2.2 Greater Rights Determinations. The Subcontractor or the employee-inventor with authorization of the Subcontractor may request greater rights than the nonexclusive license and the foreign patent rights provided in paragraph 92.3 of this clause on identified inventions, in accordance with 41 CFR 9-9.109-6. Such requests must be submitted through the Contractor to Patent Counsel (with notification by Patent Counsel to the Contractor) at the time of the first disclosure pursuant to subparagraph 92.5.2 of this clause, or not later than nine (9) months after conception or first actual reduction to practice, whichever occurs first, or such longer period as may be authorized by Patent Counsel (with notification by Patent Counsel to the Contractor) for good cause shown in writing by the Subcontractor.

### **92.3 Minimum Rights to the Subcontractor**

- 92.3.1 Subcontractor License. The Subcontractor reserves a revocable, nonexclusive, paid-up license in each patent application filed in any country on a Subject Invention and any resulting patent in which the Government acquires title. The license shall extend to the Subcontractor’s domestic subsidiaries and affiliates, if any, within the corporate structure of which the Subcontractor is a part and shall include the right to grant sublicenses of the same scope to the

extent the Subcontractor was legally obligated to do so at the time the Agreement was awarded. The license shall be transferable only with approval of DOE except when transferred to the successor of that part of the Subcontractor's business to which the invention pertains.

- 92.3.2 Revocation Limitations. The Subcontractor's nonexclusive license and sublicenses granted hereunder may be revoked or modified by DOE, either in whole or in part, only to the extent necessary to achieve expeditious practical application of the Subject Invention under DOE's published licensing regulations (10 CFR 781), and only to the extent an exclusive license is actually granted. This license shall not be revoked in that field of use and/or the geographical areas in which the Subcontractor, or its sublicensee, has brought the invention to the point of practical application and continues to make the benefits of the invention reasonably accessible to the public, or is expected to do so within a reasonable time.
- 92.3.3 Revocation Procedures. Before modification or revocation of the license or sublicense, pursuant to subparagraph 92.3.2 of this clause, DOE shall furnish the Subcontractor a written notice of its intention to modify or revoke the license and any sublicense hereunder and the Subcontractor shall be allowed thirty (30) days, or such longer period as may be authorized by the Patent Counsel (with notification by Patent Counsel to the Subcontractor) for good cause shown in writing by the Subcontractor, after such notice to show cause why the license or any sublicense should not be modified or revoked. The Subcontractor shall have the right to appeal, in accordance with 10 CFR 781, any decision concerning the modification or revocation of its license or any sublicense.
- 92.3.4 Foreign Patent Rights. Upon written request to Patent Counsel (with notification by Patent Counsel to the Subcontractor), in accordance with subparagraph 92.5.1 of this clause, and subject to DOE security regulations and requirements, there shall be reserved to the Subcontractor, or the employee-inventor with authorization of the Subcontractor, the patent rights to a Subject Invention in any foreign country where the Government has elected not to secure such rights provided:
- 92.3.4.1 The recipient of such rights, when specifically requested by DOE and three (3) years after issuance of a foreign patent disclosing said Subject Invention, shall furnish DOE a report setting forth:
- 92.3.4.1.1 The commercial use that is being made, or is intended to be made, of said invention, and
- 92.3.4.1.2 The steps taken to bring the invention to the point of practical application or to make the invention available for licensing.
- 92.3.4.2 The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government (including any Government agency) and States and domestic municipal governments, unless the Secretary or his designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.
- 92.3.4.3 Subject to the rights granted in subparagraphs (92.3.1), (92.3.2), and (92.3.3) of this clause, the Secretary or his designee shall have the right to terminate the foreign patent rights granted in this subparagraph 92.3.4.3 in whole or in part unless the recipient of such rights demonstrates to the satisfaction of the Secretary or his designee that effective steps necessary to accomplish substantial utilization of the invention have been taken or within a reasonable time will be taken.
- 92.3.4.4 Subject to the rights granted in subparagraphs (92.3.1), (92.3.2), and (92.3.3) of this clause, the Secretary or his designee shall have the right, commencing four (4) years after foreign patent rights are accorded under this subparagraph (92.3.4.4), to require the granting of a nonexclusive or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances and in appropriate circumstances to terminate said foreign patent rights in whole or in part, following a hearing upon notice thereof to the public, upon a petition by an interested person justifying such hearing:

- 92.3.4.4.1 If the Secretary or his designee determines, upon review of such material as he deems relevant, and after the recipient of such rights, or other interested person, has had the opportunity to provide such relevant and material information as the Secretary or his designee may require, that such foreign patent rights have tended substantially to lessen competition or to result in undue market concentration in any section of the United States in any line of commerce to which the technology relates; or
- 92.3.4.4.2 Unless the recipient of such rights demonstrates to the satisfaction of the Secretary or his designee at such hearing that the recipient has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.

#### 92.4 Filing of Patent Applications

- 92.4.1 With respect to each Subject Invention in which the Subcontractor or the inventor requests foreign patent rights in accordance with subparagraph 92.3.4 of this clause, a request may also be made for the right to file and prosecute the U. S. application on behalf of the U. S. Government. If such request is granted, the Subcontractor or inventor shall file a domestic patent application on the invention within six (6) months after the request for foreign patent rights is granted, or such longer period of time as may be approved by the Patent Counsel for good cause shown in writing by the requester. With respect to the invention, the requester shall promptly notify the Patent Counsel (with notification by Patent Counsel to the Subcontractor) of any decisions not to file an application.
- 92.4.2 For each Subject Invention on which domestic patent application is filed by the Subcontractor or inventor, the Subcontractor or inventor shall:
  - 92.4.2.1 Within two (2) months after the filing or within two (2) months after submission of the invention disclosure if the patent application previously has been filed, deliver to the Patent Counsel a copy of the application as filed including the filing date and serial number;
  - 92.4.2.2 Within six (6) months after filing the application or within six (6) months after submitting the invention disclosure if the application has been filed previously, deliver to the Patent Counsel a duly executed and approved assignment to the Government, on a form specified by the Government;
  - 92.4.2.3 Provide the Patent Counsel with the original patent grant promptly after a patent is issued on the application; and
  - 92.4.2.4 Not less than thirty (30) days before the expiration of the response period for any action required by the Patent and Trademark Office, notify the Patent Counsel of any decision not to continue prosecution of the application.
- 92.4.3 With respect to each Subject Invention in which the Subcontractor or inventor has requested foreign patent rights, the Subcontractor or inventor shall file a patent application on the invention in each foreign country in which such request is granted in accordance with applicable statutes and regulations and within one of the following periods:
  - 92.4.3.1 Eight (8) months from the date of filing a corresponding United States application, or if such an application is not filed, six (6) months from the date the request was granted;
  - 92.4.3.2 Six (6) months from the date a license is granted by the Commissioner of Patents and Trademarks to file the foreign patent application where such filing has been prohibited by security reasons; or
  - 92.4.3.3 Such longer periods as may be approved by the Patent Counsel for good cause shown in writing by the Contractor or inventor.

92.4.4 Subject to the license specified in subparagraphs (92.3.1), (92.3.2), and (92.3.3) of this clause, the Subcontractor or inventor agrees to convey to the Government, upon request, the entire right, title, and interest in any foreign country in which the Subcontractor or inventor fails to have a patent application filed in accordance with subparagraph (92.4.3) of this clause, or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeiture of the patent application or patent the Subcontractor or inventor shall, not less than sixty (60) days before the expiration period for any action required by any Patent Office, notify the Patent Counsel of such failure or decision, and deliver to the Patent Counsel the executed instruments necessary for the conveyance specified in this paragraph.

92.5 Invention Identification, Disclosures, and Reports

92.5.1 The Subcontractor shall establish and maintain active and effective procedures to ensure that Subject Inventions are promptly identified and timely disclosed. These procedures shall include the maintenance of laboratory notebooks or equivalent records and any other records that are reasonably necessary to document the conception and/or the first actual reduction to practice of Subject Inventions, and records which show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Subcontractor shall furnish the Contractor a description of these procedures so that he may evaluate and determine their effectiveness.

92.5.2 The Subcontractor shall furnish the Patent Counsel (with notification by Patent Counsel to the Contractor) on a DOE-approved form:

92.5.2.1 A written report containing full and complete technical information concerning each Subject Invention within six (6) months after conception or first actual reduction to practice whichever occurs first in the course of or under this Agreement, but in any event prior to any on sale, public use or public disclosure of such invention known to the Subcontractor. The report shall identify the Agreement and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains a clear understanding of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention. The report should also include any request for foreign patent rights under subparagraph (92.3.4) of this clause and any request to file a domestic patent application under subparagraph (92.1.1) of this clause. However, such requests shall be made within the period set forth in subparagraph 92.2.2 of this clause. When an invention is reported under this subparagraph 92.5.2.1, it shall be presumed to have been made in the manner specified in Section 9(a)(1) and (2) of 42 USC 5908 unless the Subcontractor contends it was not so made in accordance with subparagraph (92.7.2.2) of this clause.

92.5.2.2 Upon request, but not more than annually, interim reports on a DOE-approved form listing Subject Inventions and subcontracts awarded containing a Patent Rights article for that period and certifying that:

92.5.2.2.1 The Subcontractor's procedures for identifying and disclosing Subject Inventions as required by this paragraph 92.5 have been followed throughout the reporting period;

92.5.2.2.2 All Subject Inventions have been disclosed or that there are no such inventions; and

92.5.2.2.3 All subcontracts containing a Patent Rights article have been reported or that no such subcontracts have been awarded.

92.5.2.3 A final report on a DOE-approved form within three (3) months after completion of the Agreement work listing all Subject Inventions and all subcontracts awarded containing a Patent Rights article and certifying that:

92.5.2.3.1 All Subject Inventions have been disclosed or that there were no such inventions; and



92.5.2.3.2 All subcontracts containing a Patent Rights article have been reported or that no such subcontracts have been awarded.

92.5.3 The Subcontractor shall obtain patent agreements to effectuate the provisions of this clause from all persons in its employ who perform any part of the work under this Agreement except nontechnical personnel, such as clerical employees and manual laborers.

92.5.4 The Subcontractor agrees that the Government may duplicate and disclose Subject Invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause. If the Subcontractor is to file a foreign patent application on a Subject Invention, the Government agrees, upon written request, to use its best efforts to withhold publication of such invention disclosures until the expiration of the time period specified in subparagraph (92.4.1) of this clause, but in no event shall the Government or its employees be liable for any publication thereof.

## 92.6 Publication

It is recognized that during the course of the work under this Agreement, the Subcontractor or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this Agreement. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the Subcontractor, patent approval for release or publication shall be secured from Patent Counsel prior to any such release or publication.

## 92.7 Forfeiture of Rights in Unreported Subject Inventions

92.7.1 The Subcontractor shall forfeit to the Government, at the request of the Secretary or his designee, all rights in any Subject Invention which the Subcontractor fails to report to Patent Counsel (with notification by Patent Counsel to the Contractor) within six (6) months after the time the Subcontractor:

92.7.1.1 Files or causes to be filed a United States or foreign patent application thereon; or

92.7.1.2 Submits the final report required by subparagraph (92.5.2.3) of this clause, whichever is later.

92.7.2 However, the Subcontractor shall not forfeit rights in a Subject Invention if, within the time specified in (92.7.1.1) or (92.7.1.2) of this paragraph 0, the Subcontractor:

92.7.2.1 Prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the Agreement and delivers the same to Patent Counsel (with notification by Patent Counsel to the Contractor); or

92.7.2.2 Contending that the invention is not a Subject Invention the Subcontractor nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel (with notification by Patent Counsel to the Contractor); or

92.7.2.3 Establishes that the failure to disclose did not result from the Subcontractor's fault or negligence.

92.7.3 Pending written assignment of the patent applications and patents on a Subject Invention determined by the Secretary or his designee to be forfeited (such determination to be a final decision under the "Disputes" article of this Agreement), the Subcontractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph 0 shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to Subject Inventions.

## 92.8 Examination of Records Relating to Inventions

- 92.8.1 The Contractor or his authorized representative, until the expiration of three (3) years after final payment under this Agreement, shall have the right to examine any books (including laboratory notebooks), records, documents, and other supporting data of the Subcontractor which the Contractor or his authorized representative reasonably deems pertinent to the discovery or identification of Subject Inventions or to determine compliance with the requirements of this clause.
- 92.8.2 The Contractor or his authorized representative shall have the right to examine all books (including laboratory notebooks), records and documents of the Subcontractor relating to the conception of first actual reduction to practice of inventions in the same field of technology as the work under this Agreement to determine whether any such inventions are Subject Inventions, if the Subcontractor refuses or fails to:
- 92.8.2.1 Establish the procedures of subparagraph (92.5.1) of this clause; or
- 92.8.2.2 Maintain and follow such procedures; or
- 92.8.2.3 Correct or eliminate any material deficiency in the procedures within thirty (30) days after the Contractor notifies the Subcontractor of such a deficiency.
- 92.9 Withholding of Payment (Not Applicable to Subcontracts)
- 92.9.1 Any time before final payment of the amount of this Agreement, the Contractor may, if he deems such action warranted, withhold payment until a reserve not exceeding \$50,000 or 5 percent of the amount of this Agreement, whichever is less, shall have been set aside if in his opinion the Subcontractor fails to:
- 92.9.1.1 Establish, maintain and follow effective procedures for identifying and disclosing Subject Inventions pursuant to subparagraph (92.5.1) of this clause; or
- 92.9.1.2 Disclose any Subject Invention pursuant to subparagraph (92.5.2.1) of this clause; or
- 92.9.1.3 Deliver the interim reports pursuant to subparagraph (92.5.2.2) of this clause; or
- 92.9.1.4 Provide the information regarding subcontracts pursuant to subparagraph (92.5.2.3) of this clause; or
- 92.9.1.5 Convey to the Government in a DOE-approved form the title and/or rights of the Government in each Subject Invention as required by this clause.
- 92.9.2 The reserve or balance shall be withheld until the Contractor has determined that the Subcontractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.
- 92.9.3 Final payment under this Agreement shall not be made by the Contractor before the Subcontractor delivers to Patent Counsel all disclosures of Subject Inventions and other information required by subparagraph (92.5.1) of this clause, the final report required by subparagraph (92.5.2.3) of this clause, and Patent Counsel has issued a patent clearance certification to the Contractor.
- 92.9.4 The Contractor may, in his discretion, decrease or increase the sums withheld up to the maximum authorized above. If the Subcontractor is a nonprofit organization, the maximum amount that may be withheld under this paragraph shall not exceed \$50,000 or 1 percent of the amount of this Agreement, whichever is less. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the Agreement. The withholding of any amount or subsequent payment thereof shall not be construed as a waiver of any rights accruing to the Government under this Agreement.

#### 92.10 Lower-tier Subcontracts

- 92.10.1 For the purpose of this paragraph the term “Subcontractor” means the party awarding a lower-tier subcontract and the term “lower-tier subcontractor” means the party being awarded a lower-tier subcontract.
- 92.10.2 Unless otherwise authorized or directed by the Contractor, the Subcontractor shall include this Patent Rights article as appropriate, modified to identify the parties in any lower-tier subcontract hereunder having as a purpose the conduct of research, development, or demonstration work. In the event of refusal by a lower-tier subcontractor to accept this clause, or if in the opinion of the Subcontractor this clause is inconsistent with DOE’s patent policies, the Subcontractor:
- 92.10.2.1 Shall promptly submit written notice to the Contractor setting forth reasons for the lower-tier subcontractor’s refusal and other pertinent information which may expedite disposition of the matter; and
- 92.10.2.2 Shall not proceed with the subcontract without the written authorization of the Contractor.
- 92.10.3 Except as may be otherwise provided in this clause, the Subcontractor shall not, in any subcontract or by using a subcontract as consideration therefore, acquire any rights in its lower-tier subcontractor’s Subject Invention for the Subcontractor’s own use (as distinguished from such rights as may be required solely to fulfill the Subcontractor’s Agreement obligations to the Government in the performance of this Agreement).
- 92.10.4 All invention disclosures, reports, instruments, and other information required to be furnished by the lower-tier subcontractor to DOE, under the provisions of a Patent Rights article in any lower-tier subcontract hereunder may, in the discretion of the Contractor, be furnished to the Subcontractor for transmission to DOE.
- 92.10.5 The Subcontractor shall promptly notify the Contractor in writing upon the award of any lower-tier subcontract containing a Patent Rights article by identifying the lower-tier subcontractor, the work to be performed under the subcontract, and the dates of award, and estimated completion. Upon the request of the Contractor the Subcontractor shall furnish him a copy of the lower-tier subcontract.
- 92.10.6 The Subcontractor shall identify all Subject Inventions of the lower-tier subcontractor of which it acquires knowledge in the performance of this Agreement and shall notify the Patent Counsel (with notification by Patent Counsel to the Contractor) promptly upon the identification of the inventions.
- 92.10.7 It is understood that the Government is a third party beneficiary of any subcontract article granting rights to the Government in Subject Inventions, and the Subcontractor hereby assigns to the Government all rights that the Subcontractor would have to enforce the lower-tier subcontractor’s obligations for the benefit of the Government with respect to Subject Inventions. The Subcontractor shall not be obligated to enforce the agreements of any lower-tier subcontractor hereunder relating to the obligations of the lower-tier subcontractor to the Government regarding Subject Inventions.

#### 92.11 Background Patents

- 92.11.1 “Background Patent” means a domestic patent covering an invention or discovery which is not a Subject Invention and which is owned or controlled by the Subcontractor at any time through the completion of this Agreement.
- 92.11.1.1 Which the Subcontractor, but not the Government, has the right to license to others without obligation to pay royalties thereon; and
- 92.11.1.2 Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture or composition of matter

(including relatively minor modifications thereof), which is a subject of the research, development, or demonstration work performed under this Agreement.

92.11.2 The Subcontractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive, license under any Background Patent for purposes of practicing a subject of this Agreement by or for the Government in research, development, and demonstration work only.

92.11.3 The Subcontractor also agrees that upon written application by DOE, it will grant to responsible parties for purposes of practicing a subject of this Agreement, nonexclusive licenses under any Background Patent on terms that are reasonable under the circumstances. If, however, the Subcontractor believes that exclusive or partially exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE for DOE approval of such licensing by the Subcontractor.

92.11.4 Notwithstanding the foregoing subparagraph (92.11.3), the Subcontractor shall not be obligated to license any Background Patent if the Subcontractor demonstrates to the satisfaction of the Secretary or his designee that:

92.11.4.1 A competitive alternative to the subject matter covered by said Background Patent is commercially available or readily introducible from one or more other sources; or

92.11.4.2 The Subcontractor or its licensees are supplying the subject matter covered by said Background Patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.

## 92.12 Atomic Energy

92.12.1 No claim for pecuniary award or compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted by the Subcontractor or its employees with respect to any invention or discovery made or conceived in the course of or under this Agreement.

92.12.2 Except as otherwise authorized in writing by the Contractor, the Subcontractor will obtain patent agreements to effectuate the provisions of subparagraph (92.12.1) of this clause from all persons who perform any part of the work under this Agreement, except nontechnical personnel, such as clerical employees and manual labors.

## 92.13 Rights

Nothing contained in this Patent Rights article shall be deemed to give the Government any rights with respect to any invention other than a Subject Invention except as set forth in the Patent Rights article of this Agreement with respect to Background Patents and the Facilities License.

## 92.14 Facilities License

In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this Agreement, the Subcontractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the Subcontractor, which are owned or controlled by the Subcontractor at any time through completion of this Agreement and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility.

92.14.1 to practice or to have practiced by or for the Government at the facility, and

92.14.2 to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of the aforesaid rights and license shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein license.

### **93 ANTI-KICK BACK**

#### **93.1 Definitions**

- 93.1.1 “Kickback,” as in this clause, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any Contractor, Contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.
- 93.1.2 “Person,” as used in this clause, means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.
- 93.1.3 “Subcontractor employee,” as used in this clause, means any officer, partner, employee, or agent of a subcontractor.

#### **93.2 The Anti-Kickback Act of 1986 (41 U.S.C. 51-58) (the Act), prohibits any person from:**

- 93.2.1 Providing or attempting to provide or offering to provide any kickback.
- 93.2.2 Soliciting, accepting, or attempting to accept any kickback.
- 93.2.3 Including, directly or indirectly, the amount of any kickback in the subcontract or order price charged by a subcontractor to the Contractor or in the subcontract price charged by a subcontractor to a Contractor or higher tier subcontractor.

#### **93.3 The subcontractor shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in paragraph 93.2 of this clause in its own operations and direct business relationships.**

#### **93.4 When the subcontractor has reasonable grounds to believe that a violation described in paragraph 93.2 of this clause may have occurred, the subcontractor shall promptly report in writing the possible violation. Such reports shall be made to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice.**

#### **93.5 The subcontractor shall cooperate fully with any Federal agency investigating a possible violation described in paragraph 93.2 of this clause.**

#### **93.6 Regardless of the subcontract tier at which a kickback was provided, accepted, or charged under the contract in violation of paragraph 93.2 of this clause, the Contractor may:**

- 93.6.1 Offset the amount of the kickback against any monies owed by the Contractor under this contract and/or
- 93.6.2 Direct that the subcontractor withhold from sums owed the lower-tier subcontractor, the amount of the kickback. The Contractor may order that monies withheld under 93.6.2 of this clause be paid over to the Contractor unless the Contractor has already offset those monies under 93.6.1 of this clause. In the latter case, the subcontractor shall notify the Contractor when the monies are withheld.

#### **93.7 The subcontractor agrees to incorporate the substance of this clause, including this subparagraph 93.7, in all lower-tier subcontracts under this subcontract.**

### **94 RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT**

#### **94.1 Except as provided in 94.2 of this clause, the Subcontractor shall not enter into any agreement with an actual or prospective lower tier Subcontractor, nor otherwise act in any manner, which has or may have**

the effect of restricting sales by such lower tiers directly to the Government of any item or process made or furnished by the lower tier under this contract or under any follow-on contract.

- 94.2 The prohibition above does not preclude the Subcontractor from asserting rights that are otherwise authorized by law or regulation.

**95 PROTECTING THE GOVERNMENTS' INTEREST WHEN SUBCONTRACTING WITH DEBARRED SUBCONTRACTORS (Subcontracts exceeding \$25,000)**

- 95.1 The Subcontractor agrees to disclose to the Contractor, whether the subcontractor is debarred, suspended, or proposed for debarment by the Federal Government at the time of award.

(End of Terms and Conditions)